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04:18:45 1 (In Chambers.)

04:18:45 2 THE COURT: This is Magistrate Judge David
04:18:47 3 Ruiz. I'm here for a conference with respect to discovery
04:18:50 4 issues in the pending MDL action. I'm going to have counsel
04:18:54 5 introduce themselves on the record and then we'll proceed.
04:18:57 6 Please to my left.

04:18:58 7 MS. WADHWANI: Hi. I'm Neelum Wadhwani from
04:19:01 8 Williams & Connolly.

04:19:02 9 MR. PYSER: Steven Pyser, P-Y-S-E-R, also with
04:19:05 10 Williams & Connolly, for Cardinal Health.

04:19:07 11 MR. CHEFFO: Mark Cheffo from Quinn Emanuel
04:19:09 12 for Purdue.

04:19:10 13 MS. STRONG: Sabrina Strong of O'Melveny &
04:19:13 14 Myers for Johnson & Johnson and Janssen.

04:19:16 15 MS. RENDON: Good afternoon. Carole Rendon,
04:19:18 16 BakerHostetler, for Endo.

04:19:20 17 MR. BOEHM: Good afternoon. Paul Boehm at
04:19:22 18 Williams & Connolly for Cardinal Health.

04:19:24 19 MR. RAFFERTY: Troy Rafferty for the
04:19:25 20 plaintiffs.

04:19:25 21 MR. KENNEDY: Eric Kennedy, plaintiffs.

04:19:27 22 MR. BUCHANAN: Dave Buchanan for plaintiffs.

04:19:30 23 MR. WEINBERGER: Peter Weinberger for
04:19:32 24 plaintiffs.

04:19:32 25 MR. ACKERMAN: David Ackerman for the

04:19:34 1 plaintiffs.

04:19:34 2 MR. MILLER: Parker Miller, Alabama.

04:19:35 3 MS. SCULLY: Jennifer Scully [ph] in for the
04:19:38 4 plaintiffs.

04:19:39 5 THE COURT: Thank you.

04:19:40 6 I'd like to first commend the counsel for working
04:19:45 7 cooperatively with Special Master Cohen to address a number
04:19:50 8 of these discovery issues that you face in this MDL action
04:19:53 9 and to prepare initial drafts of proposed protective order
04:19:59 10 and document production protocol.

04:20:00 11 Now, I understand that there are some issues that the
04:20:03 12 parties were not able to resolve, so I'll open up the floor
04:20:07 13 to hear what current disputes there are. I know that you
04:20:12 14 had met a number of times previously, you met and conferred,
04:20:15 15 and then you -- prior to going on the record here, you met
04:20:18 16 with Special Master Cohen. And it's my understanding you
04:20:21 17 have been able to resolve at least one pending issue. But
04:20:23 18 if that's not the case, I'd like to please understand that.

04:20:26 19 MS. WADHWANI: Your Honor, Neelum Wadhwani on
04:20:29 20 behalf of Cardinal Health.

04:20:29 21 THE COURT: Yes.

04:20:30 22 MS. WADHWANI: The issues that I understand to
04:20:32 23 be live in front of you right now, one of them relates to
04:20:36 24 the proposed protective order. And the issue is whether a
04:20:42 25 fact witness for one defendant may be shown confidential

04:20:46 1 information at a deposition where the witness is not an
04:20:50 2 employee of the party whose information it is.

04:20:52 3 And then with regard to the ESI protocol, we have a
04:20:57 4 few issues. The first is the format of current and future
04:21:03 5 productions.

04:21:05 6 The plaintiff had requested native format. The
04:21:10 7 defendants believe TIFF is the appropriate format.
04:21:12 8 Relatedly, the question as to whether documents are produced
04:21:16 9 in TIFF should be produced in color or not.

04:21:18 10 We also have an issue related to a format of the prior
04:21:22 11 productions, and those are the productions that are due June
04:21:25 12 11th under CMO number 1.

04:21:28 13 And then your comment makes me think that based on our
04:21:32 14 conversations with Special Master Cohen just a few minutes
04:21:36 15 ago, the issue as to the application of the ESI protocol to
04:21:40 16 the plaintiffs, whether it's track 1 or all plaintiffs,
04:21:44 17 might have been resolved, and that is going to apply to all
04:21:49 18 plaintiffs.

04:21:49 19 However, in the ESI protocol there is a provision that
04:21:52 20 allows any plaintiff who feels that the provisions of that
04:21:56 21 protocol may be unduly burdensome or expensive to them to
04:22:01 22 request a meet-and-confer with the defendants to see if
04:22:04 23 there can be other agreements reached. So with that, I
04:22:07 24 think that issue is off the table, but I'll --

04:22:08 25 THE COURT: Okay. Mr. Buchanan is going to be

04:22:11 1 taking the lead?

04:22:12 2 MR. BUCHANAN: Yes, I'll be addressing these
04:22:14 3 points.

04:22:14 4 THE COURT: Okay. Go ahead, sir.

04:22:14 5 MR. BUCHANAN: With Special Master Cohen, he
04:22:16 6 was reframing or restating, you know, where we are in these
04:22:19 7 issues.

04:22:19 8 To be clear with regard to productions of other
04:22:22 9 plaintiffs, the proposed order that was submitted was
04:22:24 10 submitted for the track 1 plaintiffs and defendants. The
04:22:27 11 concern expressed by the defense was, well, did we want
04:22:32 12 something that's going to apply more broadly.

04:22:35 13 As to that issue with regard to more broadly, we agree
04:22:38 14 as a PSC that any production any of these defendants make,
04:22:41 15 so long as it conforms with this production protocol, is
04:22:44 16 good as to any plaintiff in the MDL. In other words, if any
04:22:48 17 plaintiff later litigates their claim before this Court,
04:22:51 18 they will accept the format of production that's been
04:22:53 19 negotiated by the PEC.

04:22:54 20 The concern that arose was the format of the
04:22:58 21 plaintiffs' production as it relates to non-track 1
04:23:01 22 plaintiffs, non-bellwether plaintiffs in particular, whether
04:23:04 23 that was a format they could feasibly comply with, whether
04:23:08 24 the proportionality considerations might be different.

04:23:11 25 We wouldn't want, for example, for the litigating

04:23:14 1 their claim effectively to be uneconomic because of a
04:23:17 2 probation protocol. We'd want them to have an opportunity
04:23:20 3 to be heard to present the circumstance why they may need to
04:23:23 4 deviate.

04:23:24 5 So we're okay with it being good for the track 1
04:23:27 6 plaintiffs and the defense production being good for any
04:23:31 7 plaintiff from a production format.

04:23:34 8 And as long as -- and a subsequent bellwether
04:23:38 9 plaintiff when they're designated could be heard to the
04:23:41 10 extent their circumstances present a need to deviate.

04:23:43 11 MS. WADHWANI: And I think the ESI protocol
04:23:46 12 already provides for that.

04:23:47 13 THE COURT: That's my understanding in the
04:23:48 14 protocol that was filed, that it does have that provision
04:23:50 15 enabling any plaintiff that wishes to have a reconsideration
04:23:54 16 of that to raise the issue with the Court -- or meet and
04:23:57 17 confer first and then, if necessary, raise the issue with
04:23:59 18 the Court.

04:23:59 19 So based upon that, are you comfortable with that
04:24:01 20 procedure?

04:24:02 21 MR. BUCHANAN: I am, Your Honor, yes. And
04:24:03 22 understanding that we don't anticipate this production
04:24:05 23 format even presumptively applying outside of a bellwether
04:24:09 24 setting, you know, when a plaintiff is designated. Because
04:24:11 25 they're not in discovery right now, the broader plaintiffs.

04:24:15 1 THE COURT: Okay. All right. Now, with
04:24:16 2 respect to the other issues that Attorney Wadhwani
04:24:22 3 indicated, to use your phrasing, are live issues,
04:24:25 4 Mr. Buchanan, anything you'd like to specifically address
04:24:28 5 with respect to those issues?

04:24:28 6 MR. BUCHANAN: Sure. I guess we can start
04:24:29 7 with native if that's fine with the Court.

04:24:31 8 THE COURT: Sure. Let's first look at the
04:24:33 9 initial issue of prior production, kind of take it
04:24:39 10 historically.

04:24:40 11 MR. BUCHANAN: Sure. What the plaintiffs had
04:24:41 12 asked for initially was that the prior productions be made
04:24:43 13 in a format that would match the production format that we
04:24:45 14 negotiated. We said, look, if you have the productions on a
04:24:50 15 platform, you know, one of these document management
04:24:53 16 platforms, and it's just a matter of selecting, you know,
04:24:55 17 different fields or different options when you export the
04:24:57 18 prior productions, export the prior productions in a format
04:25:00 19 that matches this format so essentially the prior
04:25:03 20 productions are as usable as they can possibly be.

04:25:05 21 We understood, frankly, from our -- the defense
04:25:09 22 presentation to Special Master Cohen last week that as a
04:25:13 23 general matter, the defendants just intended to copy the CDs
04:25:16 24 they previously delivered to regulators and other people and
04:25:20 25 turn those over to us.

04:25:22 1 We asked for an opportunity to at least know if they
04:25:26 2 had that information in a production platform so that it
04:25:29 3 could be generated in this format. And I think -- I thought
04:25:32 4 the parties had stipulated that the defendants would provide
04:25:35 5 that information to the plaintiffs so that if it was
04:25:37 6 available in that other production format, it could be
04:25:40 7 obtained by the plaintiffs. If there was an additional
04:25:43 8 cost, we might have to bear that cost or would presumptively
04:25:46 9 have to bear that cost. But otherwise, the defendants were
04:25:49 10 just going to send the disks across the transom.

04:25:52 11 So that was a stipulated provision as of last Friday
04:25:55 12 in the order that went to the board.

04:25:56 13 THE COURT: Okay. Ms. Wadhwani?

04:25:59 14 MS. WADHWANI: We disagree with that for the
04:26:01 15 following reasons: Those provisions appear in the ESI
04:26:06 16 protocol, Judge Ruiz, because Special Master Cohen had given
04:26:09 17 us his ruling on last week when we met with him in
04:26:13 18 Washington, DC, and we did not want to be disrespectful to
04:26:17 19 those rulings and to the role that he had played in trying
04:26:20 20 to assist us to come to agreement. So when we met with
04:26:26 21 Special Master Cohen, we told him that we had some
04:26:28 22 exceptions to his rulings and we would be raising objections
04:26:31 23 with you about them.

04:26:33 24 When we submitted the orders last Friday night, right
04:26:39 25 after those were submitted and those reflected Special

04:26:44 1 Master Cohen's rulings, the defendants submitted their
04:26:45 2 objections and sought the hearing that we're all having
04:26:48 3 today.

04:26:49 4 So while the language that Mr. Buchanan cites did go
04:26:55 5 into the orders, that was out of deference to Special Master
04:26:59 6 Cohen's rulings in respect to Special Master's rulings, but
04:27:02 7 also we had raised with him and he has acknowledged we
04:27:05 8 raised with him and has in fact referred all these issues to
04:27:08 9 you based on our objections and request for a hearing.

04:27:11 10 THE COURT: So what is your specific objection
04:27:12 11 then to the request from plaintiffs' counsel?

04:27:17 12 MS. WADHWANI: Our objection is that, as
04:27:19 13 Mr. Buchanan has said, they want our prior productions to be
04:27:22 14 reformatted and rerun to conform to the formatted
04:27:26 15 production.

04:27:26 16 THE COURT: It sounds to me like the original
04:27:29 17 request is, one, are those maintained in a platform and
04:27:33 18 then --

04:27:33 19 MS. WADHWANI: So there is a stipulation that
04:27:34 20 we will tell him what we know about our prior productions
04:27:37 21 within 14 days after the entry of the order. We have
04:27:44 22 concerns, however, even with that information, about
04:27:48 23 producing any documents in a new format other than the
04:27:52 24 format in which they were previously produced unless that
04:27:55 25 format is not reasonably usable.

04:27:58 1 Rule 34 of the Federal Rules of Civil Procedure do not
04:28:01 2 require a party to produce an electronic format in more than
04:28:06 3 one format unless that format is not reasonably usable.

04:28:10 4 And in addition, there are going to be some
04:28:13 5 productions that might just be all PDF. And matching up the
04:28:18 6 natives, finding the natives for a production that might
04:28:21 7 have been converted into an image file before it was even
04:28:24 8 reviewed and determined to be produced could create a lot of
04:28:28 9 burden.

04:28:28 10 I think, as you have aptly pointed out today and
04:28:33 11 Special Master Cohen has pointed out today, we're on a very
04:28:35 12 fast schedule. For the defendants to go and not only
04:28:38 13 identify these prior productions, collect them, identify
04:28:43 14 where they may be housed, turn that information over to the
04:28:45 15 other side, and then have to rerun, reformat, potentially
04:28:50 16 match up PDFs with natives all by June 11th when they are
04:28:56 17 going to receive reasonably usable formats for the platforms
04:29:00 18 that we understand they're using seems to be an unnecessary
04:29:04 19 waste of the parties' resources, time, and expenses when
04:29:08 20 we're also trying to double track discovery right now and
04:29:11 21 work on producing documents in response to each other's
04:29:15 22 discovery requests.

04:29:16 23 MR. CHEFFO: Can I say one just historical
04:29:18 24 thing?

04:29:18 25 THE COURT: Go ahead, Mr. Cheffo.

04:29:20 1 MR. CHEFFO: Thank you. And I'm sorry to
04:29:21 2 interrupt. I hope I didn't.

04:29:23 3 You know, you've been with this from the beginning,
04:29:25 4 right? And when we had the CMO that we worked out on this,
04:29:28 5 there was a lot of give and take, I think. And one of the
04:29:31 6 things at least I heard was Mr. Rice and others essentially
04:29:35 7 saying, we just want the ability to give everybody else and
04:29:39 8 share the information that we already have with the rest of
04:29:43 9 the PSC. You don't have to produce anything; you don't have
04:29:46 10 to do anything. There's no burden arguments. We have
04:29:48 11 Chicago. We just want the ability to deem it produced.
04:29:51 12 That was what you heard several times. It's what we heard.
04:29:55 13 And ultimately, through a lot of give and take, that's what
04:29:58 14 we agreed to do.

04:29:59 15 Now what we're hearing is we don't just want what we
04:30:02 16 had, we actually want you to do more on top of what was
04:30:05 17 given us in the format at the same time that we also have to
04:30:09 18 do new production.

04:30:09 19 So this seems to be taking a few steps back on what
04:30:13 20 the original intent and why we agreed to do this on such an
04:30:19 21 expedited time frame. So I just wanted to remind the Court
04:30:23 22 of that context.

04:30:25 23 MR. WEINBERGER: Before Dave responds to
04:30:25 24 that...

04:30:25 25 THE COURT: Mr. Weinberger, go ahead.

04:30:27 1 MR. WEINBERGER: Yes, we had some
04:30:29 2 negotiations, but it's really important that we distinguish
04:30:32 3 what we're talking about here.

04:30:33 4 So we've got the Chicago documents, and then we've got
04:30:37 5 prior productions, too, that the defendants have made.

04:30:44 6 And with respect to the latter group of documents,
04:30:46 7 there was a negotiated agreement that ended up on page 15,
04:30:51 8 Section K number 2, of the CMO that the defendants shall
04:30:56 9 engage in rolling production of previously produced
04:30:59 10 documents during the 61-day period. And that's what we
04:31:04 11 raised with the Court this morning, the fact that we have
04:31:07 12 not received one single document under this provision.

04:31:12 13 So setting aside the Chicago documents, which
04:31:15 14 obviously Chicago plaintiffs' counsel have, there has not
04:31:20 15 been a single document produced on a rolling basis, which
04:31:23 16 was, as I understand it, part of the agreed negotiated
04:31:28 17 portion of this CMO.

04:31:30 18 MR. CHEFFO: Well, that's a new issue. I'm
04:31:33 19 happy to respond to that. I thought we weren't going to
04:31:34 20 raise new issues, but go ahead.

04:31:36 21 But the point is -- I think to that is what we're all
04:31:39 22 trying to do. I know I can speak for my client. We're
04:31:42 23 trying to figure out, right, as we said, if that we thought
04:31:45 24 there would be overlapping productions of what was there.
04:31:48 25 You will receive, very soon, notice that a lot of what were

04:31:51 1 in some of these other productions were also in the Chicago
04:31:53 2 production and getting people to figure that out. So that's
04:31:56 3 what we've --

04:31:57 4 MR. WEINBERGER: Well, with respect to the
04:31:58 5 manufacturer. Because the Chicago documents are with the
04:32:01 6 manufacturer.

04:32:01 7 MR. CHEFFO: Yeah, well, I can speak to -- I
04:32:01 8 mean, again --

04:32:01 9 MR. WEINBERGER: I understand. I'm sorry.
04:32:01 10 I'm sorry to interrupt you.

04:32:04 11 MR. CHEFFO: No, no, no, I just wanted to
04:32:05 12 clarify. I mean, we can -- I'd be happy to discuss if you
04:32:09 13 have -- this is the first time I'm hearing that you had some
04:32:11 14 concerns about it. You could let me know if we do and we'll
04:32:14 15 try and raise these.

04:32:15 16 THE COURT: Mr. Buchanan, go ahead.

04:32:21 17 MR. BUCHANAN: Just to respond to
04:32:22 18 Ms. Wadhwani's argument.

04:32:22 19 THE COURT: Please do.

04:32:23 20 MR. BUCHANAN: The representation was that the
04:32:24 21 defendants were just going to turn over disks to us. When
04:32:27 22 that became -- and not go through and do a further review
04:32:31 23 and try and match things up to what's been produced as it
04:32:35 24 relates to prior productions.

04:32:36 25 THE COURT: Right.

04:32:36 1 MR. BUCHANAN: We wanted to get with the
04:32:37 2 defense and meet and confer and say, look, if you have these
04:32:40 3 in a production platform, before you give them to us in a
04:32:43 4 format that essentially elects the old production format, if
04:32:50 5 you're going to go -- the way these platforms work, as Your
04:32:53 6 Honor may know, you can store the production on the
04:32:54 7 platform. And the platform -- this was the Chicago wave 1,
04:32:59 8 this was the Chicago wave 2, this was the Chicago wave 3.

04:33:02 9 And if all the defense was going to do was go back to
04:33:05 10 the platform and press Chicago wave 1, Chicago wave 2,
04:33:08 11 Chicago wave 3, our ask was, well, can you comply with this
04:33:13 12 protocol as it relates to those prior productions?

04:33:15 13 That was in -- they strenuously objected. We
04:33:18 14 presented it to Special Master Cohen last week. And the
04:33:22 15 plaintiffs lost; the defense won. And the resolution of
04:33:27 16 that was what I thought was reflected in the submitted CMO,
04:33:32 17 which was you'll at least tell us what prior productions
04:33:34 18 you're going to produce, you'll at least tell us if they're
04:33:36 19 in a different format, and you'll at least let us, you know,
04:33:39 20 pay the excess, if we wish to, so we can get them in an
04:33:43 21 optimal format so we could use them.

04:33:44 22 But in no way did we anticipate that having a
04:33:47 23 discussion to make sure we'd get them in a usable format
04:33:49 24 would somehow bar production of anything or delay the
04:33:52 25 production of anything. I mean, our goal is still to get

04:33:55 1 those over the transom as quickly as possible. We
04:33:57 2 understood what the defense was going to do was ship what
04:34:00 3 they've already shipped, and we could pay an excess charge
04:34:02 4 if we had to pay an excess charge for a different format.

04:34:07 5 MS. STRONG: And, Your Honor, it's not as
04:34:08 6 simple as just flipping a switch or pushing a button and
04:34:11 7 producing it in a different format. There are additional
04:34:15 8 burdens associated with a reformatting of a production. And
04:34:19 9 one of those -- I don't purport to know, you know, all of
04:34:24 10 them, but one of them is, for example, examining all of the
04:34:26 11 metadata that's involved in the native document. And, for
04:34:28 12 example, if there's privileged material in there, that would
04:34:31 13 need to be reviewed and redacted and addressed
04:34:34 14 appropriately.

04:34:34 15 So it's a very different process to reformat a
04:34:37 16 production that was done in one way and convert that to a
04:34:40 17 native production. It's not as simple as just pushing a
04:34:46 18 button and letting it proceed out in a different format,
04:34:48 19 Your Honor.

04:34:48 20 THE COURT: Okay. Now, you're talking about
04:34:52 21 prior productions. I'm familiar with the Chicago
04:34:54 22 production. To the extent there have been other
04:34:56 23 productions, it's unclear to me the extent, the volume, the
04:35:00 24 nature of those productions.

04:35:02 25 So, Attorney Wadhwani, can you illuminate for me the

04:35:06 1 extent to which there have been prior productions, formats
04:35:08 2 for those prior productions. If you can speak on the -- I
04:35:11 3 know you probably won't be able to speak to specific detail
04:35:14 4 for each of the prior productions, but to the extent that
04:35:16 5 you know right now.

04:35:17 6 MS. WADHWANI: Well, I can speak to some of
04:35:20 7 Cardinal Health because that's my client.

04:35:23 8 We are still in the process of gathering and working
04:35:27 9 through those productions. I know that some of the prior
04:35:29 10 productions that we have made are in TIFF format and some of
04:35:34 11 them are in PDF format.

04:35:36 12 I have an understanding that some of those productions
04:35:39 13 may not still be in this live database that Mr. Buchanan
04:35:45 14 keeps referring to that he thinks that we can go quickly
04:35:49 15 look at. You know, to Ms. Strong's point, there's more
04:35:55 16 involved than just simply pushing a button.

04:35:58 17 And in addition, Judge Ruiz, understanding that
04:36:03 18 Special Master Cohen I believe thought he was trying to
04:36:06 19 reach some kind of good middle ground with this cost
04:36:09 20 shifting argument, I think that that in itself will cause us
04:36:14 21 to incur unnecessary delays and get into what essentially is
04:36:19 22 discovery -- disputes about discovery. Because the costs
04:36:24 23 involved here are not just the simple costs of rerunning a
04:36:28 24 production. There is attorney time in finding out what
04:36:30 25 platforms exist, attorney time if we're converting to native

04:36:35 1 in reviewing for privileged and confidential information,
04:36:39 2 attorney time if something is in a PDF yet exists somewhere
04:36:43 3 else in native in matching up the productions.

04:36:46 4 When we submit those fees and expenses to the other
04:36:51 5 side, they may push back and resist and want to have
04:36:55 6 affidavits and billable entries and the like. And then
04:36:59 7 we're arguing in the middle of producing current discovery
04:37:04 8 in response to current requests discovery -- having to fight
04:37:11 9 that discovery.

04:37:11 10 THE COURT: Thank you.

04:37:12 11 Attorney Buchanan, anything that you'd like to add to
04:37:14 12 the last point with respect to this duplicate issue?

04:37:16 13 MR. BUCHANAN: Yes, Your Honor. There were a
04:37:17 14 number of arguments that were just raised, really the first
04:37:20 15 time I heard them.

04:37:20 16 To be clear, what the plaintiffs wanted to do is just
04:37:22 17 make this as usable as possible. I did not appreciate,
04:37:25 18 frankly, after -- in all our discussions, that the
04:37:27 19 defendants objected to making information available about
04:37:30 20 the prior productions or providing information about the
04:37:34 21 platforms they were in or about offering to us the
04:37:36 22 opportunity to pay for an excess if we wanted them.

04:37:39 23 We want the information as quickly as possible.
04:37:42 24 That's our goal. I feel like we've gone down a rabbit hole
04:37:45 25 that none of us thought we were going down.

04:37:47 1 THE COURT: I agree with that sentiment,
04:37:50 2 Attorney Buchanan, that when you look at the case management
04:37:52 3 plan, it had contemplated immediately making the Chicago
04:37:55 4 production available and then starting a rolling production
04:37:58 5 of any prior productions, to have that completed by June
04:38:02 6 11th. Now we're --

04:38:04 7 MR. WEINBERGER: 30 days.

04:38:06 8 THE COURT: 30 days from now, right? So we
04:38:08 9 have a very short time frame to comply with the terms of the
04:38:10 10 case management order.

04:38:13 11 And with respect to the prior productions, the prior
04:38:18 12 productions should be produced in the format in which they
04:38:20 13 were produced previously on a rolling basis, as soon as
04:38:25 14 possible. Based upon the issues that have been put before
04:38:30 15 me, I don't see an overwhelming argument to have the
04:38:35 16 documents reformatted in a different format to make them
04:38:39 17 more usable. What I've heard is that the documents as
04:38:41 18 produced previously would be reasonably usable, which I
04:38:44 19 think is the appropriate standard under the Federal rules.

04:38:47 20 So to the extent prior productions are provided under
04:38:52 21 the case management plan that's currently in place, those
04:38:56 22 will be produced in the format in which they were previously
04:38:58 23 produced as soon as possible. Okay?

04:39:00 24 Now, the second issue with respect to the format of
04:39:08 25 the documents to be produced going forward in this MDL.

04:39:10 1 Mr. Buchanan?

04:39:11 2 MR. BUCHANAN: Yes, Your Honor.

04:39:12 3 So we obviously have a lot of work to do. We have to
04:39:15 4 move very quickly. I think we're down to about 110 or 120
04:39:19 5 days left.

04:39:21 6 So what the plaintiffs asked for was a native
04:39:23 7 production. What the defendants proposed was a native
04:39:27 8 production as it related to certain documents and not to
04:39:29 9 others. The defendants proposed in their initial order -- I
04:39:33 10 think they've since recanted that, but they proposed native
04:39:36 11 production of Excel files, native production of audio/video
04:39:41 12 files, and native production of other files that were not
04:39:43 13 renderable I guess essentially in TIFF.

04:39:46 14 THE COURT: In the TIFF format.

04:39:48 15 MR. BUCHANAN: That's not reflected in the --
04:39:50 16 that's the initial proposal from the defense from April 27.

04:39:52 17 THE COURT: But that's not what reflected in
04:39:54 18 the proposed --

04:39:54 19 MR. BUCHANAN: What's reflected in the
04:39:56 20 proposal is -- what's reflected in what was submitted is
04:39:59 21 agreeable to the plaintiffs. We thought what was reflected
04:40:01 22 in the proposal was agreeable to the defense. We learned
04:40:04 23 through the e-mail exchange that you were a part of that it
04:40:07 24 was nonetheless not.

04:40:08 25 I'll note that the City of Chicago production mirrored

04:40:13 1 this process. It was a native production with Excel
04:40:19 2 files --

04:40:19 3 THE COURT: With respect to Excel
04:40:20 4 spreadsheets, audio files, PowerPoint presentations, things
04:40:23 5 that weren't renderable in TIFF. But to the extent there
04:40:26 6 was a production, it was default TIFF with text file, global
04:40:30 7 files?

04:40:31 8 MR. BUCHANAN: Yeah, so the production was
04:40:32 9 native as it related to -- for nonredacted documents, native
04:40:35 10 for Excel and PowerPoint, two of the core document formats.

04:40:38 11 The one exception that we've been fussing about here I
04:40:41 12 guess is Word files. And our problem with, you know,
04:40:44 13 getting Word files in nonnative really comes down to when
04:40:48 14 you have multiple editors on the file. So when you have
04:40:50 15 track changes and you can't discern who's made the change
04:40:53 16 without hovering over the track changes or you can't read
04:40:56 17 the comments because the comments, you know, will default to
04:40:59 18 a certain size when it's a heavily commented document.
04:41:01 19 You'll see the first three lines and ellipses after that.

04:41:05 20 The way parties try to solve for this sometimes is
04:41:09 21 through color production because color can identify some of
04:41:12 22 the differences, the renderable differences between them, or
04:41:15 23 by having a meet-and-confer process on a
04:41:17 24 document-by-document basis as a problematic document is
04:41:21 25 identified.

04:41:22 1 In my experience what happens with that is, yes, that
04:41:25 2 can happen, you can request the file. Defendants will go
04:41:28 3 and look at it. They'll then evaluate that. Then it's got
04:41:31 4 to be reproduced to you and re-Bates-numbered. Then it has
04:41:34 5 to be loaded back into the document platform. And then it
04:41:37 6 takes everything out of the workflow when you're trying to
04:41:40 7 get ready for witnesses.

04:41:41 8 So we believe native is -- well, it is the way these
04:41:44 9 are maintained internally. It is a common production
04:41:47 10 format. I've got a stack of I think six CMOs from major
04:41:51 11 MDLs that default to native for PowerPoints, Word files, and
04:41:55 12 Excel files, all three, as well as the AV and also PDFs.

04:41:59 13 And one of the problems with not getting PDFs in
04:42:01 14 natives is that the links get broken. So internal links and
04:42:05 15 external links don't work once they get TIFFed, which is,
04:42:09 16 again, you know, a review delay.

04:42:11 17 So when it comes to expediency, we think that native
04:42:15 18 is the way to go. It's the way that several MDLs, frankly
04:42:19 19 MDLs involving counsel at this table, have produced their
04:42:22 20 documents. Johnson & Johnson in I believe it's the PPI, the
04:42:27 21 Xarelto case, that's the way they're doing them.

04:42:29 22 So the platforms are built for this. The platforms
04:42:32 23 are produced. The native gets loaded in. The native gets
04:42:35 24 reviewed or can be reviewed. And then at the time of
04:42:37 25 production a choice can be made. And a production default,

04:42:42 1 you know, format can be generated for a given case. And
04:42:45 2 that default format can be just produce them in TIFF,
04:42:49 3 certain document types in TIFF, certain document types in
04:42:53 4 TIFF plus native, or certain document types in native only,
04:42:57 5 or you could have PDF, or you can combine this, if you will,
04:43:00 6 menu of choices any way you wish. And that's the production
04:43:03 7 output.

04:43:04 8 So we think that the production output that the
04:43:07 9 defendants defaulted to in Chicago with regard to
04:43:10 10 PowerPoint, Excel, and everything else just should be
04:43:12 11 extended to the Word files for this extremely massive
04:43:16 12 litigation that's only -- well, it's far bigger than it was
04:43:19 13 in Chicago. It will allow us to move faster, the platforms
04:43:23 14 can handle it, and our review will go much more smoothly.

04:43:26 15 THE COURT: Thank you, Attorney Buchanan.

04:43:27 16 Attorney Wadhwani?

04:43:28 17 MS. WADHWANI: Our original ESI proposal to
04:43:32 18 the plaintiffs was that there would be certain file types
04:43:36 19 that would be produced in native, such as Excel
04:43:39 20 spreadsheets, audio/video files, and of course a provision
04:43:43 21 that speaks to the concerns that Mr. Buchanan has mentioned,
04:43:47 22 which is that if there is a document in TIFF format which is
04:43:51 23 not rendered usable, we will of course entertain their
04:43:58 24 reasonable requests for a native production and move from
04:44:02 25 there.

04:44:04 1 To our minds, there should be no dispute at all, that
04:44:09 2 the right result here is TIFF, and there are two reasons
04:44:11 3 why.

04:44:12 4 THE COURT: Are you proposing pure TIFF or
04:44:14 5 TIFF plus text file loadable metadata?

04:44:17 6 MS. WADHWANI: TIFF plus text files loadable
04:44:19 7 metadata.

04:44:20 8 And the parties have agreed, Your Honor, as you can
04:44:22 9 see from the ESI protocol, on the metadata fields, which are
04:44:27 10 quite expansive. Effectively, the amount of information
04:44:29 11 they are getting from the load files, the metadata, plus the
04:44:32 12 image is almost a near native.

04:44:36 13 But what TIFF removes from the calculus that native
04:44:42 14 doesn't is a whole host of concerns that are defendants'
04:44:46 15 concerns in this case. One of them is that native format is
04:44:50 16 alterable and can be manipulated.

04:44:52 17 When you open up a document in Word that is someone
04:44:56 18 else's document, you know, even inadvertently, the document
04:45:02 19 can be altered. And then if the alteration is the document
04:45:06 20 that walks into a deposition setting, that can have enormous
04:45:10 21 consequences.

04:45:11 22 Courts have long recognized that TIFF format is the
04:45:14 23 most secure format of production.

04:45:17 24 Another concern is the proliferation of sensitive
04:45:21 25 materials without the ability to track where they're going

04:45:24 1 and whether they've been designated as confidential under
04:45:27 2 the protective order from the face of the document.

04:45:31 3 The protective order, as typically happens, requires
04:45:36 4 the parties to stamp on the face of each document the
04:45:39 5 confidentiality protections that document is receiving, if
04:45:43 6 any. By definition, a native format does not have a Bates
04:45:46 7 number or a confidentiality designation branded on it, so
04:45:50 8 there's no way from the face of that document for anyone to
04:45:53 9 know when they disseminate, use, or receive that native
04:45:57 10 document whether it's subject to the protections of the
04:46:01 11 protective order.

04:46:02 12 In this case, where all the defendants are competitors
04:46:07 13 of many of the other defendants, that presents a serious and
04:46:11 14 legitimate concern about the potential damage and harm to
04:46:13 15 the business interests of each defendant.

04:46:16 16 In addition, metadata in native can be hidden, and
04:46:21 17 thus privileged or highly sensitive information may be used
04:46:24 18 during the review of documents and produced by mistake,
04:46:27 19 necessitating claw-backs.

04:46:29 20 And fourth, the overall costs of dealing with native
04:46:32 21 documents given all these concerns leads to native being
04:46:36 22 more expensive.

04:46:37 23 It's for these reasons that we think both the Sedona
04:46:43 24 Conference and its principles says that TIFF is a reasonably
04:46:49 25 usable format and that it provides greater protections as

04:46:55 1 the most commonly used format in the last decade.

04:46:58 2 We also think these concerns are partly the reasons
04:47:01 3 motivating appendix K to the local rules of the Northern
04:47:05 4 District of Ohio, which state that in -- when agreement is
04:47:08 5 not reached between the parties as to the format of -- do
04:47:14 6 you know what I'm about to say?

04:47:14 7 THE COURT: I do. The default standard, PDF.

04:47:17 8 MS. WADHWANI: The default standard when
04:47:18 9 there's no agreement is TIFF or PDF.

04:47:20 10 THE COURT: Yes.

04:47:20 11 MS. WADHWANI: We are proposing TIFF because
04:47:22 12 there is not agreement between the parties.

04:47:24 13 THE COURT: Mr. Buchanan?

04:47:26 14 MR. BUCHANAN: Yes, Your Honor.

04:47:28 15 The very frustrating part of this is the defendants
04:47:31 16 are using platforms through which they have access to the
04:47:34 17 native files. As a matter of review, as a matter of their
04:47:38 18 use and kind of searching and doing analytics, they have the
04:47:41 19 native files. What they are saying is they'd elect to
04:47:44 20 choose not to give us the same thing that they use to
04:47:47 21 review.

04:47:47 22 They have agreed to produce spreadsheets and
04:47:50 23 PowerPoints in native format in Chicago, as well as AV
04:47:54 24 files. Any concern about alteration, any concern about
04:47:57 25 confidentiality, it's hard for me to discern how that

04:48:00 1 argument would not apply with the same force to the
04:48:03 2 spreadsheets and PowerPoints, yet there's agreement to do it
04:48:05 3 there.

04:48:05 4 THE COURT: Attorney Wadhwani, what's your
04:48:07 5 response to that?

04:48:08 6 MS. WADHWANI: Our response --

04:48:09 7 THE COURT: And I know -- go ahead.

04:48:11 8 MS. WADHWANI: Our response is that it's
04:48:14 9 highly unlikely in most instances that spreadsheets carry
04:48:18 10 the same concerns that we have here with Word documents
04:48:22 11 about confidentiality and privilege embedded into them in
04:48:26 12 the metadata.

04:48:28 13 MR. BUCHANAN: I think we can search the
04:48:30 14 Chicago production, we'll see "confidential" and "highly
04:48:32 15 confidential" stamped all over PowerPoints and spreadsheets.
04:48:37 16 Formulas -- excuse me, financial data, sales data, all kinds
04:48:40 17 of information has been widely designated as confidential in
04:48:43 18 the Chicago production. I don't see how the concern applies
04:48:48 19 with any less force as relates to those categories.

04:48:50 20 More generally though, I mean, this is the way it is
04:48:53 21 being done in big pieces of litigation. This is how it's
04:48:57 22 being done with these defendants in many other cases.

04:49:01 23 MS. WADHWANI: It's also the standard for the
04:49:03 24 last ten years --

04:49:04 25 MR. BUCHANAN: Excuse me.

04:49:05 1 THE COURT: Attorney Wadhwani, let Attorney
04:49:07 2 Buchanan finish.

04:49:08 3 Go ahead.

04:49:08 4 MR. BUCHANAN: I think what -- the platforms
04:49:09 5 became much more I'll say usable from a processing
04:49:12 6 perspective for output in recent years. It's very easy to
04:49:17 7 load natives, it's more easy to search natives, it's easy to
04:49:19 8 do analytics with natives.

04:49:21 9 And as a production matter, the menu of choices that
04:49:23 10 you're given on output, what would you like, A, B, or C or A
04:49:27 11 and C or A and B, that exists by file format. So I can't
04:49:30 12 discern why a Word document would be any different than a
04:49:35 13 PowerPoint, each of which could contain confidential
04:49:38 14 information, where the defense would have access to
04:49:42 15 comments, the full comment bubbles, the full discussions,
04:49:45 16 knowing who changed what in what sequence when, and we would
04:49:49 17 not.

04:49:49 18 And we have a process where, yes, we could take this
04:49:52 19 out of the workflow, out of the review queue, and come back
04:49:56 20 to the defense and say could you provide this back to us.
04:49:58 21 We'll get production media or an FTP site, we'll download
04:50:02 22 it, we'll load it back in. That takes everything out of the
04:50:04 23 flow as we're trying to get ready for depositions on a
04:50:07 24 schedule really unlike any I've ever experienced. So it
04:50:12 25 seems really unreasonable to draw a distinction on Word

04:50:14 1 files.

04:50:15 2 Now, I would say I have a stack of order after order
04:50:17 3 in the last two or three years in major pieces of litigation
04:50:20 4 with many thousands of cases, BPI involving Johnson &
04:50:25 5 Johnson, Volkswagen, Judge Breyer, I think it resolved for
04:50:29 6 \$15 billion. No small piece of litigation. Native files
04:50:32 7 produced for every file format we've talked about here with
04:50:35 8 TIFF sidecars.

04:50:36 9 The defendants were concerned that they wanted to also
04:50:39 10 produce TIFFs, so they chose to produce TIFFs as well as
04:50:42 11 natives. They checked both box A and box B when they
04:50:46 12 produced them.

04:50:46 13 The U.S. Government produces things in native. The
04:50:49 14 Department of Justice when they're involved as a civil party
04:50:52 15 in disputes does so. Chrysler Jeep, Xarelto, also involving
04:50:57 16 Janssen or Johnson & Johnson, produced native I think also
04:51:00 17 with TIFF for all these file formats.

04:51:02 18 So, yes, there is a deep experience with TIFF. It
04:51:05 19 goes back many years for ordinary cases. For cases that are
04:51:08 20 getting loaded up where you're not just going to run it
04:51:11 21 through the scanner or do it, you know, through some other
04:51:13 22 tool, cases that merit putting it into relativity, bringing
04:51:17 23 in a document vendor and using a processing tool, native and
04:51:21 24 TIFF, native for these types of files is the way things go.

04:51:25 25 MR. CHEFFO: Can I just respond? Just two

04:51:27 1 things.

04:51:27 2 I don't doubt that there's five or six orders, but
04:51:31 3 I've been involved in a lot of litigation, including MDLs
04:51:34 4 recently involving thousands of cases with many of the firms
04:51:37 5 here. I think it's an unusual practice, it's not the rule,
04:51:41 6 from my perspective again, sample size of one. But the fact
04:51:43 7 that you find a few of these is not the way it's typically
04:51:46 8 done. Lipitor, Zolof, many, many litigations that's not
04:51:50 9 been done.

04:51:50 10 Two, you know, I think what you've heard is kind of a
04:51:54 11 reasonable compromise on certain documents that don't have
04:51:57 12 some of the same. I mean, obviously you can have an on and
04:52:01 13 off thing. I think what the defendants have kind of
04:52:03 14 proposed is somewhat of a compromise that's kind of the --
04:52:09 15 works for both sides.

04:52:10 16 The thing I haven't really heard answered is really
04:52:13 17 the issue of Bates stamping. I mean, could you imagine,
04:52:17 18 there's going to be documents going on at the same time in
04:52:20 19 depositions, did you see this document, is this the one that
04:52:22 20 you showed. We're going to have authentication issues and
04:52:26 21 come back, I don't know, that looks a little bit different.
04:52:29 22 Somebody -- that's formatted differently, it doesn't have
04:52:31 23 the same page.

04:52:32 24 I mean, it's a host of kind of unnecessary -- to me
04:52:34 25 it's far more complicating than the idea -- all I've really

04:52:38 1 heard is, well, we're in a fast schedule. And I agree with
04:52:41 2 that completely. And we may have to talk to each other.
04:52:43 3 But you know what, it's not realistic, right, that we are
04:52:46 4 not going to have to talk to each other in good faith
04:52:49 5 probably 10 times a day about discovery issues and
04:52:52 6 dispositive issues and problem, they send me a document I
04:52:56 7 can't read or question.

04:52:57 8 So that's going to happen. Good faith takes care of
04:52:59 9 this. Rather than have the exception kind of create the
04:53:01 10 rule here, I think what we've proposed is very reasonable.

04:53:06 11 MS. STRONG: Yes. And Your Honor, I would --
04:53:07 12 you know, in terms of the balancing issues of
04:53:10 13 confidentiality, just because defendants have agreed to
04:53:14 14 produce Excel in native doesn't warrant opening that up
04:53:18 15 where it's otherwise not necessary given all of the other
04:53:21 16 factors that are in play.

04:53:23 17 I would note that under Sedona Principles they
04:53:26 18 observed that native file production that includes a
04:53:28 19 substantial volume and variety of file types could become
04:53:32 20 very expensive and burdensome and substantially impact the
04:53:35 21 speed of production. So it recognizes just the opposite of
04:53:39 22 what's being said by plaintiffs' counsel here, Your Honor,
04:53:42 23 that actually producing in native is more burdensome, more
04:53:44 24 costly, and slower.

04:53:45 25 I would also say from J & J's perspective, I don't

04:53:49 1 know the specific orders that he's addressing, but I know
04:53:50 2 that their standard protocol when it comes to PDF and Word
04:53:54 3 is to not produce in native. That is not J & J's standard
04:53:59 4 protocol. To the extent that he's suggesting that they may
04:54:02 5 have agreed to it in a case here or there which I'm not
04:54:04 6 familiar with, that is not their standard protocol.

04:54:07 7 THE COURT: Attorney Buchanan, can you talk to
04:54:09 8 some of the practical complications that Attorney Cheffo has
04:54:13 9 highlighted and Attorney Wadhwani has highlighted with
04:54:16 10 respect to the use of native production in depositions, in
04:54:18 11 motion practice, and future proceedings in this litigation
04:54:22 12 versus a TIFF that would have a Bates number on it,
04:54:28 13 confidentiality designation on it, to the extent there is
04:54:30 14 one, and can be more readily tracked that way rather than I
04:54:34 15 think what you may allude to as in fact keeping attached
04:54:37 16 values and other ways to track electronically a native
04:54:40 17 production?

04:54:42 18 MR. BUCHANAN: Yes. So the proposal from the
04:54:44 19 defense, what they had proposed on April 27 is what is
04:54:47 20 commonly done with native productions. It's for their
04:54:51 21 native -- for their native spreadsheets or in the Chicago
04:54:55 22 protocol native spreadsheets and also native PowerPoints.
04:55:00 23 You produce a slip sheet into the main production that
04:55:02 24 identifies the document produced in native. It identifies
04:55:05 25 the Bates number that gets uniquely tagged to it, and it

04:55:09 1 requires for use at deposition that the document be appended
04:55:12 2 with the Bates number so that any party who wants to check
04:55:14 3 it can always check it. That is the practice that's being
04:55:18 4 used commonly for native productions in litigation upon
04:55:20 5 litigation that I've been involved in.

04:55:24 6 And no one's risking their ticket altering documents.
04:55:27 7 I mean, that concern is, to me, a makeweight argument. No
04:55:32 8 one's editing or changing the content of documents. And
04:55:35 9 even if somebody were so inclined, I'd submit changing a
04:55:38 10 number intentionally or accidentally with a spreadsheet is a
04:55:41 11 lot easier than changing a Word file. But it just doesn't
04:55:45 12 happen. I'm not aware of any cases where it's been raised.
04:55:48 13 It's not a practical consideration.

04:55:49 14 The one that is a practical consideration is
04:55:52 15 suggesting that we're going to be meeting and conferring all
04:55:54 16 the time. This should be added to the list of
04:55:57 17 meet-and-confer -- you know, request topics that we're just
04:56:00 18 going back and forth with on a regular basis.

04:56:04 19 For me to highlight to a defendant a particular
04:56:07 20 document that I'm interested in, you know, this is one that
04:56:09 21 rises to the level that I'm willing to say I want it in
04:56:13 22 native, there's something about this document that's
04:56:15 23 uniquely important, I'm now going to reveal to somebody
04:56:19 24 what's essentially work product of someone in selecting
04:56:22 25 documents just so I can see the full document. That would

04:56:27 1 happen. We wouldn't do it with every Word file because
04:56:30 2 doing it with every Word file would be needlessly going back
04:56:33 3 and forth to the defense anytime we saw one with comments.
04:56:36 4 We would only do it in ones that were candidates or
04:56:38 5 important candidates for us. And now they've got a nice set
04:56:41 6 of our work product.

04:56:45 7 MS. WADHWANI: With the metadata that the
04:56:47 8 parties have agreed to produce, plaintiffs are going to have
04:56:52 9 a trove of information that is going to give them all the
04:56:54 10 information I've heard today that they want in terms of the
04:56:58 11 ability to run analytics, conduct searches, find out who --
04:57:02 12 you know, what hidden text is in there in terms of track
04:57:07 13 changes.

04:57:07 14 What I haven't heard from them is a response to our
04:57:11 15 very legitimate concerns about proliferation of confidential
04:57:15 16 and sensitive materials, particularly in a case with
04:57:19 17 multiple defendants who are competitors. The VW case
04:57:23 18 involved VW, not VW and all its competitors.

04:57:27 19 MR. BUCHANAN: PPI involves a dozen PPI
04:57:29 20 manufacturers. It's a native production. And, yes, the way
04:57:34 21 it's handled for confidential materials is it's designated
04:57:37 22 on the slip sheet together with a Bates number, it gets
04:57:40 23 marked together with the printout of the document at the
04:57:42 24 deposition. That's how parties in big litigation work with
04:57:46 25 these productions. And it's not too difficult.

04:57:49 1 As to comments being in metadata, I'm not aware of a
04:57:53 2 metadata field that tracks comments. That's the problem.
04:57:56 3 That is the issue. The comments are not revealed on the
04:57:58 4 face of the document or a portion of the comments are
04:58:01 5 revealed on the face of the document. The only way to truly
04:58:03 6 see the full thing and full comment and the only way to see
04:58:07 7 the back and forth and the way things evolved is by hovering
04:58:09 8 over various portions of the Word document. I'm sure we all
04:58:12 9 have the experience of pulling up a track change document
04:58:15 10 and seeing three lines of the comment and having to hit the
04:58:18 11 ellipses to see the rest. That -- the rest does not appear
04:58:21 12 in the metadata.

04:58:23 13 MS. WADHWANI: Well, it sounds like they're
04:58:25 14 using a cast to cover what should be used with a Band-Aid.
04:58:30 15 If they see one of those documents where they are concerned,
04:58:33 16 they can come to us. We're not going to form a group trying
04:58:36 17 to get into the inner workings of their legal strategy.
04:58:39 18 This process of opposing parties coming to us saying, I
04:58:44 19 think I need to see the native of this document, here's the
04:58:46 20 reason, we say we agree or we don't agree. We're too busy
04:58:50 21 to sit there and think about all the reasons why they may be
04:58:53 22 wanting that document. We move on to the next thing on our
04:58:55 23 list.

04:58:56 24 THE COURT: You have something you want to
04:58:58 25 add?

04:58:58 1 MR. WEINBERGER: Yes. As to this issue of,
04:58:59 2 you know, there are multiple defendants here that are
04:59:01 3 competitors, I would refer the Court to the transcript of
04:59:04 4 the ARCOS hearing from February 26, 2018, page 52, where the
04:59:09 5 Court was addressing this argument that there's a concern
04:59:12 6 about sharing information because of the competition. And
04:59:16 7 the Court said: Quite frankly, there shouldn't be a lot of
04:59:19 8 competition for distributing opioids. If they want to
04:59:22 9 compete on something else, fine.

04:59:25 10 So, you know, this notion that since everything here
04:59:28 11 revolves around the production of documents associated with
04:59:34 12 the manufacture and distribution of opioids, this concern
04:59:36 13 about competitive disadvantages associated with this
04:59:41 14 production really should not come into play.

04:59:45 15 THE COURT: Now I'll give you an opportunity
04:59:51 16 to address the issue between color and black and white.

04:59:53 17 MS. WADHWANI: Color is a much bigger file.
04:59:58 18 It is -- which therefore adds to a lot of cost. It is
05:00:01 19 bigger to host, it is bigger to produce, it is bigger to
05:00:04 20 receive and then store on your own system, if you're
05:00:07 21 receiving color from multiple other parties. Again, the
05:00:10 22 number of times when color is necessary to understand the
05:00:16 23 meaning and context of a document is going to be a very
05:00:19 24 small fraction of an overall production. And our proposal
05:00:23 25 originally in the ESI protocol was come to us if you have a

05:00:29 1 color document that -- or document that you think you need
05:00:31 2 in color to more fully understand it. Happens all the time.

05:00:35 3 I have two cases right now where we've produced color
05:00:37 4 documents to them in response to such requests saying, yes,
05:00:40 5 you're right, here you go. But, again, we're looking for
05:00:44 6 the exception to swallow the rule.

05:00:48 7 THE COURT: Mr. Buchanan?

05:00:49 8 MR. BUCHANAN: Yes. I think we've all seen
05:00:52 9 how color can be relevant, so our default obviously for
05:00:56 10 PowerPoints, as the default was in Chicago, was color.
05:01:00 11 Color is often material. When you turn something into
05:01:04 12 grayscale, you can't see text versus the backdrop. It
05:01:08 13 becomes more challenging, I'd say. It becomes debatable.
05:01:11 14 And we can have witnesses debating things in depositions
05:01:15 15 when, no, I don't think it says that, this is the best copy
05:01:18 16 I have, this is the copy your counsel produced to me, I'm
05:01:20 17 using the one, you know, you designated as the official one,
05:01:24 18 so -- and then you have debates with witnesses about that.

05:01:27 19 It becomes really problematic though when you start
05:01:29 20 looking at graphs and charts and where you just have line
05:01:32 21 graphs, when you have bar graphs, and you can't discern the
05:01:35 22 difference between one versus the other.

05:01:37 23 I think this is -- if Your Honor were to rule that the
05:01:41 24 default is native, then I think we're talking about color in
05:01:44 25 a very small fraction of the production. It should only be

05:01:48 1 for those documents that are redacted.

05:01:51 2 On documents that they redact for, you know, privilege
05:01:54 3 or work product, then under the protocol that we submitted
05:01:58 4 together last week, the defendants would have the right to
05:02:02 5 redact those portions, and then we would ask for those
05:02:05 6 documents to be produced in color if they're in color.

05:02:08 7 There's multiple different file formats. They have
05:02:11 8 varying ranges of file sizes. You can elect different ways
05:02:14 9 to show how big or small an individual page could get,
05:02:18 10 whether it's a JPEG, which might be larger, or you pick a
05:02:21 11 PDF in color, which might be the most compressed format.

05:02:25 12 So we're happy to talk with them about it. The
05:02:28 13 plaintiffs are willing to do the same thing in reverse. I
05:02:30 14 mean, that's the thing about this protocol is we have
05:02:32 15 entities that have documents, that have -- this is not an
05:02:36 16 individual injury case where a plaintiff is asking for the
05:02:40 17 moon, sun, and the stars. We will have documents; we will
05:02:42 18 have to do this in reverse. We are willing to do this
05:02:45 19 because we know that we need it this way too to hit the
05:02:49 20 dates we have to hit.

05:02:50 21 The friction that gets created by having to ask for
05:02:53 22 replacement files as a reviewer says, "I'm not sure what
05:02:56 23 this means," it adds a week, it doesn't add a day. And
05:03:01 24 because it has to go to them, then it has to be loaded back
05:03:05 25 into the system, has to get back to the reviewer. And we

05:03:09 1 just don't have that luxury in this case.

05:03:11 2 MS. WADHWANI: And again, we expect any
05:03:14 3 documents that they would want in color for which there
05:03:17 4 would be a legitimate reason because the meaning and context
05:03:19 5 is not clear to be a very small percentage of the overall
05:03:22 6 production. So they are asking for the exception to cover
05:03:27 7 everything instead of it being the exception for which there
05:03:31 8 will be a provision written into the protocol for it.

05:03:34 9 MR. BUCHANAN: I would add one other point,
05:03:36 10 Your Honor.

05:03:36 11 THE COURT: Attorney Buchanan, if the standard
05:03:38 12 default becomes TIFF with loadable files unless it's
05:03:44 13 something that's not renderable in a TIFF format, such as an
05:03:51 14 Excel spreadsheet or PowerPoint where you would lose some
05:03:54 15 functionality of the underlying document, what would you
05:03:57 16 propose then with respect to color pictures?

05:04:01 17 MR. BUCHANAN: If I understand, you know, kind
05:04:02 18 of the default format being essentially TIFF for e-mail and
05:04:05 19 Word files and it would be native I guess for Excel and
05:04:09 20 PowerPoint. Did I understand you correctly?

05:04:11 21 THE COURT: That's my question.

05:04:12 22 MR. BUCHANAN: Okay. So I don't think we're
05:04:14 23 talking about anything material with regard to color on
05:04:18 24 e-mails. It's really coming down to the Word files. And
05:04:23 25 the only significance I see is that when you have multiple

05:04:26 1 parties doing track changes, the track changes are often
05:04:29 2 different colors depending on who's making the changes. And
05:04:32 3 if you're not getting the native file, you would want the
05:04:35 4 colors so that you could see and track who actually did what
05:04:37 5 change.

05:04:38 6 THE COURT: It's my understanding then if that
05:04:40 7 document's not -- if a Word document has track changes in it
05:04:43 8 and it's not produced in native format but produced in a
05:04:45 9 TIFF format with color, with the underlying metadata you
05:04:49 10 would be able to see at least reference to track change.
05:04:53 11 It's my understanding the software capability you can
05:04:55 12 capture that.

05:04:55 13 MR. BUCHANAN: So you can turn a lot of things
05:04:57 14 on in the processing engines for the software. I have not
05:05:01 15 seen any processing engine that will reveal the full comment
05:05:07 16 bubbles on the side. So if you have -- just say one page is
05:05:10 17 heavily commented and you've got a series of comment bubbles
05:05:13 18 stacked up, you'll get three or four lines for each of the
05:05:16 19 comment bubbles even on the TIFF. It doesn't -- because
05:05:19 20 then it would paginate onto the next page. It doesn't
05:05:22 21 process it that way. You get ellipses and you don't know
05:05:27 22 what the rest of the comments are. So that's the -- in the
05:05:30 23 scenario you're proposing, I think that would still be a
05:05:35 24 hole.

05:05:36 25 MS. WADHWANI: And so in that rare instance

05:05:38 1 where they see an ellipsis, they could say could I please
05:05:41 2 have this information for the document. But to hear
05:05:44 3 Mr. Buchanan speak, you would think it would be every single
05:05:46 4 document that we're going to encounter this problem,
05:05:49 5 therefore the need for native outweighs the default
05:05:52 6 standard, the most commonly used format, reasonably usable
05:05:55 7 format of TIFF across courts through this country in the
05:05:57 8 last decade. It's overblowing the concerns.

05:06:02 9 TIFF has been used widely. And as the Sedona
05:06:05 10 conference said, it is the most commonly used format for the
05:06:08 11 last decade.

05:06:10 12 MR. BUCHANAN: The only -- where this leaves
05:06:12 13 us is where the defendants have access at any point in time
05:06:16 14 to the full comment. They have that as part of their
05:06:20 15 review, they have that as part of their processing, and
05:06:22 16 there's an election not to produce that for reasons that I'd
05:06:27 17 say I don't see how those reasons would warrant withholding
05:06:32 18 that format.

05:06:34 19 The cost, our vendor tells us, is not going to be any
05:06:38 20 greater to produce native than TIFF. Actually, I'm told
05:06:41 21 it's less. The hosting charges for hosting native files are
05:06:44 22 less. Certainly as it relates to, you know, Word files and
05:06:51 23 e-mails and Excel sheets, much more cost effective. So I
05:06:56 24 don't understand the cost issue.

05:06:58 25 I -- it seems as though there is a content-related

05:07:03 1 reason for not sharing Word documents in a native file that
05:07:08 2 is concerning. And, yes, if we could iterate this process
05:07:12 3 over six months to nine months or a year, like many cases
05:07:16 4 allow, yeah, you could go back and forth, you could go back
05:07:19 5 and forth and iterate for requests.

05:07:20 6 I am still troubled that they then know which
05:07:22 7 documents I'm concerned about enough to ask for in terms of
05:07:26 8 a particular file format. You know, maybe they don't have
05:07:29 9 the team watching that, but I can't imagine somebody doesn't
05:07:32 10 shoot an e-mail around if it's an interesting document
05:07:34 11 that's called to their attention.

05:07:35 12 So if they've got them in this format, we'd ask that
05:07:38 13 they share them with us in that format.

05:07:41 14 MR. CHEFFO: Your Honor, just, you know, the
05:07:43 15 plaintiffs keep talking about the time frame. We agree, but
05:07:45 16 let's remember the plaintiffs are the one who asked for
05:07:48 17 these trial dates even sooner. So to hear them, you know,
05:07:51 18 talk about all this, I mean, I think we all knew what this
05:07:54 19 was going to take, and we're all under a lot of pressure to
05:07:57 20 get it done, first thing.

05:07:58 21 The second is I think, you know, really what you've
05:08:00 22 heard is, at least one argument as I understood
05:08:04 23 Mr. Buchanan, is there's somehow information that we don't
05:08:06 24 have. You also heard that if they get a document and it
05:08:09 25 shows a few ellipses, that they could then ask for that

05:08:13 1 document, right? The only kind of response there was, well,
05:08:16 2 maybe it will take a little more time, which again I think
05:08:18 3 we've talked about.

05:08:19 4 So the idea that there's nothing that they won't have
05:08:21 5 or is hidden or is, you know, usable only by the defendants
05:08:25 6 because just by the nature of the document, it's going to
05:08:28 7 have those ellipses, to which they can just ask and then we
05:08:32 8 will expeditiously respond. And if we don't, that's what
05:08:36 9 you're here for if they think that we're dragging our feet.

05:08:39 10 So I do think that we're trying to kind of create this
05:08:41 11 very broad rule based on what we're hearing is a really,
05:08:45 12 really narrow exception.

05:08:49 13 MR. ACKERMAN: Your Honor, I'd want to address
05:08:50 14 that point real quick about whether this is a narrow
05:08:53 15 exception. I think a significant portion of document
05:08:55 16 production, especially from the manufacturers, are going to
05:08:57 17 be -- have to do with label changes. They're going to have
05:09:00 18 to do with communications back and forth with the FDA as
05:09:04 19 well as internal communications regarding changes to the
05:09:06 20 labels.

05:09:09 21 Those documents that we've seen in Chicago are Word
05:09:11 22 documents with track changes turned on. And you cannot tell
05:09:15 23 in those documents when they're produced in a black and
05:09:18 24 white TIFF format who made the changes, and you cannot read
05:09:21 25 the comments because the changes tend to be extensive.

05:09:29 1 THE COURT: Anyone else like to --

05:09:29 2 MR. BOEHM: Your Honor, I just have two quick
05:09:29 3 points.

05:09:29 4 THE COURT: Go ahead, sir.

05:09:31 5 MR. BOEHM: Paul Boehm from Williams &
05:09:36 6 Connolly for Cardinal Health. I'll try not to overlap with
05:09:38 7 all the many points that have already been made.

05:09:41 8 But I did hear Mr. Buchanan, who I respect very much
05:09:44 9 and have worked with in other cases, I respect him as a
05:09:46 10 plaintiffs' lawyer, talk about the possibility of alteration
05:09:48 11 and indicate that he and other people who he worked with
05:09:51 12 wouldn't intentionally alter a document. And I think that
05:09:55 13 is the case. I think that -- I think that Mr. Buchanan
05:09:58 14 would not intentionally alter a document.

05:09:59 15 But I can just speak to that a little bit because I've
05:10:02 16 had two occasions where I've had a document altered. One
05:10:06 17 very much -- I trust the lawyer -- very much
05:10:09 18 unintentionally, but he was bringing it in to use at a
05:10:12 19 deposition without knowing, without understanding. And it
05:10:14 20 was only through some investigative process that we realized
05:10:17 21 that. And he was very apologetic.

05:10:18 22 But I raised that, because I didn't want it to go
05:10:21 23 unanswered, that that is a real possibility and something
05:10:24 24 that can and in fact does sometimes happen.

05:10:26 25 The second point is with respect to Excel. And you'd

05:10:29 1 asked a question about how much of their -- how much is that
05:10:33 2 distinction between a Word document and an Excel file, how
05:10:37 3 much does that really matter, is there really a distinction.
05:10:40 4 There's a reason why, commonly, Excel files are accepted.
05:10:42 5 It is now rather common to have Excel --

05:10:45 6 THE COURT: Produced in native format because
05:10:48 7 you have the underlying formula, and that's the information
05:10:50 8 that makes the Excel spreadsheet usable and reasonably
05:10:53 9 useful, yes, sir.

05:10:54 10 MR. BOEHM: Correct. That's all I was going
05:10:56 11 to say, that there's a reason why it doesn't translate as
05:10:58 12 well as these other files that are really in question today
05:11:01 13 in terms of TIFF vs. native.

05:11:04 14 THE COURT: Okay. Anyone else?

05:11:07 15 MR. BUCHANAN: We'd just be rehashing
05:11:08 16 territory.

05:11:08 17 THE COURT: I agree.

05:11:11 18 All right. Now, with respect to the format of
05:11:26 19 production going forward, what was unclear to me in what was
05:11:32 20 filed as the proposed ESI protocol is what was actually
05:11:41 21 agreed by the parties. Now, I've heard some differing
05:11:43 22 positions here: I've heard what was originally agreed to by
05:11:46 23 the defendants; I've heard the plaintiffs' position. And I
05:11:50 24 applaud counsel for thoroughly presenting your views and
05:11:57 25 representing your interests.

05:11:58 1 With respect to the format going forward though, the
05:12:07 2 standard that will govern in this case with respect to the
05:12:13 3 production will be a default standard of TIFF with the text
05:12:19 4 file loadable metadata file. To the extent all the
05:12:23 5 metadata's been identified in the proposed order, that
05:12:26 6 metadata should be captured, including loadable files that
05:12:30 7 would be able to be cross-referenced with the static TIFF
05:12:36 8 image.

05:12:36 9 With respect to certain document -- type of document
05:12:41 10 formats that are not readily renderable into TIFF format
05:12:45 11 such that they do not meet a reasonably usable format, such
05:12:50 12 as Excel spreadsheet, PowerPoints, audio/video files, those
05:12:54 13 should be produced in native format. That should be the
05:12:56 14 default standard for those productions.

05:13:02 15 And I make this determination based upon a balancing
05:13:05 16 of the various issues that the parties have raised here with
05:13:10 17 respect to the burden of a native production versus the
05:13:14 18 benefit of a native production versus the usability or lack
05:13:20 19 of usability or reduced usability of a nonnative production.

05:13:27 20 It's this Court's determination based upon existing
05:13:32 21 case law, the Federal Rules of Civil Procedure, as well as
05:13:34 22 the principles set forth in the Sedona Conference, that a
05:13:39 23 TIFF format with text and loadable file is a reasonably
05:13:42 24 usable format. Based upon the fact that the parties have
05:13:45 25 not reached an agreement with respect to the standard

05:13:48 1 format, that's what will be the standard format governing
05:13:51 2 production in this case going forward, with the specific
05:13:54 3 exception that to the extent there's Excel spreadsheets,
05:13:59 4 PowerPoints, volume files, WAV files, as I've indicated,
05:14:01 5 those should be produced in native format.

05:14:05 6 Now, with respect to the issue of color or black and
05:14:08 7 white, I'd like to get a better understanding here. Is
05:14:14 8 it -- when documents are reviewed electronically to be
05:14:20 9 gathered to convert into TIFF, it's my understanding that
05:14:26 10 you can create a TIFF file that has color in it. It doesn't
05:14:33 11 have to be black and white.

05:14:34 12 MR. BUCHANAN: Mm-hmm.

05:14:35 13 THE COURT: Is that right --

05:14:36 14 MS. WADHWANI: I believe that's right.

05:14:37 15 THE COURT: -- Attorney Wadhwani?

05:14:38 16 Attorney Buchanan?

05:14:40 17 MR. BUCHANAN: Yes, it could be TIFF, it could
05:14:42 18 be a PDF, it could be a JPEG. There's a number of different
05:14:45 19 file formats that can be used in a color --

05:14:46 20 THE COURT: Right, I understand, if you're
05:14:48 21 going to convert something into color. But my specific
05:14:48 22 question was with respect to TIFF. But I understand if you
05:14:51 23 have a -- for example, a Word document that has some sort of
05:14:53 24 color image in it, you can convert it to PDF, you can
05:14:56 25 convert it to a photo technology.

05:14:59 1 MR. BUCHANAN: There is a TIFF file format for
05:15:02 2 color, Your Honor.

05:15:03 3 THE COURT: And, Attorney Wadhwani, I heard
05:15:05 4 the fundamental objection to not using color in creating
05:15:14 5 TIFF files was a concern over the size and cost. Any
05:15:19 6 additional issues there?

05:15:20 7 MS. WADHWANI: No. It's burdensome and
05:15:22 8 expensive, and most documents, as you know, come in black
05:15:25 9 and white in native. And so we think that this is a -- to
05:15:29 10 order color for all TIFFs would be a large sweep of a small
05:15:35 11 problem.

05:15:38 12 THE COURT: Attorney Buchanan? Is there a --
05:15:41 13 I'll give you an opportunity. Is there an extent to readily
05:15:44 14 identify underlying documents that are in a color format
05:15:47 15 such that there can be a selective TIFFing, if you will, of
05:15:53 16 documents in color format, or does it need to be one or the
05:15:55 17 other, black and white or in color? Is there a balance that
05:15:57 18 we can reach here?

05:15:59 19 MR. BUCHANAN: I would say, Your Honor, if
05:16:01 20 you're drawing a distinction between redacted and non, with
05:16:04 21 redacted --

05:16:04 22 THE COURT: So with redacted it's going to
05:16:05 23 have to be redacted --

05:16:06 24 MR. BUCHANAN: If it's redacted --

05:16:07 25 THE COURT: -- created in a TIFF file.

05:16:09 1 MR. BUCHANAN: Right. If it was redacted into
05:16:11 2 a TIFF file, you know, and it was a PowerPoint or an Excel
05:16:13 3 sheet, I would say color is material and that should be the
05:16:16 4 default. It's hard for me to say with regard to Word if
05:16:20 5 there's not track changes. There may be a metadata field
05:16:23 6 that can -- the parties -- we'd have to talk to a vendor
05:16:25 7 about that. You know, if there's track changes in the
05:16:27 8 document, I think that may be a Word metadata file that if
05:16:32 9 that's flagged yes, we'd process them in color because I
05:16:35 10 think that is the circumstance where it would matter for
05:16:37 11 Word most generally.

05:16:38 12 MS. WADHWANI: And my colleague brings up a
05:16:41 13 good point, which is that in today's day and age, often in
05:16:45 14 e-mails, the signature line will be in color. So that will
05:16:48 15 add an enormous size and burden and expense just to produce,
05:16:54 16 say, the Cardinal Health logo in color on the bottom of
05:16:56 17 every single e-mail.

05:16:59 18 MR. BUCHANAN: Plaintiffs were not asking for
05:17:01 19 e-mail --

05:17:01 20 THE COURT: You're not asking for e-mail --

05:17:02 21 MR. BUCHANAN: -- in color.

05:17:03 22 THE COURT: -- being TIFF in color. I
05:17:04 23 understand that. But to the extent a document, a Word
05:17:06 24 document, for example, has track changes in it, is it
05:17:11 25 your -- Attorney Buchanan, you're indicating that you're

05:17:13 1 able to use the document production software to identify
05:17:19 2 whether or not there's track changes and, if that's the
05:17:22 3 case, default should be color for that?

05:17:23 4 MR. BUCHANAN: I'd have to discern that with
05:17:25 5 our vendor. I just don't know. I believe there's a field
05:17:27 6 that indicates whether or not there is, quote, hidden data,
05:17:30 7 a metadata field. I don't know if we specified it in our --

05:17:33 8 MS. WADHWANI: That's specified in the
05:17:34 9 metadata.

05:17:35 10 MR. BUCHANAN: So if that flag can be turned
05:17:37 11 on for yes and so the documents that hit that were the ones
05:17:40 12 that were processed, that would go most of the way to
05:17:43 13 addressing plaintiffs' concern.

05:17:44 14 THE COURT: So if that hidden text flag is
05:17:47 15 identified, it's your request that document be rendered in
05:17:51 16 color TIFF?

05:17:51 17 MR. BUCHANAN: Color TIFF.

05:17:52 18 THE COURT: Attorney Wadhwani.

05:17:54 19 MS. WADHWANI: My concern is that that is
05:17:57 20 going to slow down the review and production processes
05:17:59 21 because now you have some Word documents that are going to
05:18:04 22 be produced in color, some Word documents that aren't going
05:18:06 23 to be produced in color. And there's going to have to be
05:18:08 24 indications for both of those, and there's a lot of room --

05:18:12 25 THE COURT: What do you mean indications for

05:18:14 1 both of those?

05:18:14 2 MS. WADHWANI: So if you're going to produce
05:18:16 3 some -- there has to be a way to tell the person to prepare
05:18:18 4 the production and a way during the review to indicate that
05:18:21 5 to the person who's going to be preparing and ultimately
05:18:23 6 shipping out the production, these Word documents go in
05:18:25 7 color and these Word documents go in black and white. When
05:18:28 8 we have, according to your order, Excel spreadsheets and
05:18:32 9 PowerPoints in native, that's simple, that's all or nothing.
05:18:36 10 Now we're trying to slice and dice, which I'm worried is
05:18:40 11 going to really slow down the review and production
05:18:42 12 processes.

05:18:45 13 THE COURT: I understand the issues presented
05:18:49 14 from each side. But to the extent that a metadata field
05:18:53 15 identifies hidden text in a document that is to be converted
05:18:59 16 to TIFF, that document, the default should be that that's
05:19:03 17 rendered in color rather than a black and white image.

05:19:14 18 MS. STRONG: For clarity on that, so that's
05:19:16 19 just track changes documents, Your Honor?

05:19:18 20 THE COURT: Hidden data. Well, okay, here's
05:19:22 21 what I'm -- what I'd like to have happen here. It's based
05:19:27 22 upon the determination I make here. I'd like counsel to
05:19:32 23 continue to work together and provide a stipulated ESI
05:19:36 24 protocol. I trust that you'll be able to work through that
05:19:38 25 minor issue in presenting it.

05:19:41 1 What I'd like to have happen is have that filed
05:19:43 2 ideally by Friday, but I understand under the press of
05:19:46 3 business, we're running a little late today, so Monday, if
05:19:48 4 that's doable, for the parties to come together, set a new
05:19:52 5 protocol based upon what we discussed here, and file it as a
05:19:55 6 proposed ESI document production protocol for the Court to
05:19:59 7 consider.

05:19:59 8 MR. BUCHANAN: We have thoroughly narrow
05:20:01 9 issues, Your Honor, so I don't think that will be a problem.
05:20:03 10 There are about a dozen hidden data fields specified as
05:20:06 11 metadata, so we'll work in identifying those fields. If the
05:20:10 12 flag is set for yes, if I'm understanding the Court's
05:20:12 13 ruling --

05:20:12 14 THE COURT: If the flag is set for yes, then
05:20:14 15 that should be produced in a color TIFF.

05:20:16 16 MR. BUCHANAN: Understood.

05:20:16 17 THE COURT: And what to him trying to do is
05:20:18 18 balance the issues for both sides.

05:20:21 19 Now, with respect to the final issue that I think we
05:20:23 20 need to address here is the use of confidential documents --
05:20:26 21 documents that have been designated confidential by one
05:20:28 22 defendant and using those documents in a deposition of
05:20:32 23 another defendant's employee.

05:20:34 24 MR. BUCHANAN: I'm sorry, Your Honor, I know
05:20:35 25 it's late, but there was an issue, and I'm not sure if maybe

05:20:37 1 you addressed it, maybe you didn't, and I just missed it.

05:20:39 2 THE COURT: Go ahead.

05:20:40 3 MR. BUCHANAN: It's the treatment of
05:20:43 4 PowerPoint files and Excel files to the extent they're
05:20:45 5 redacted. So if there's a legitimate basis to redact those,
05:20:50 6 what is the default production format for those? And I
05:20:53 7 believe they would largely contain color, but that's --

05:20:58 8 THE COURT: I think the default standard for
05:21:00 9 that should be color as well. And if it's a color image, if
05:21:04 10 it's a color document that's maintained in the ordinary
05:21:07 11 course of business but color images within it, then in my
05:21:11 12 view, in order to make it reasonably usable, it should be
05:21:14 13 produced in a color format as well.

05:21:15 14 MR. BUCHANAN: Thank you.

05:21:15 15 THE COURT: Now, use of confidential documents
05:21:19 16 in a deposition.

05:21:21 17 MR. BUCHANAN: The concern, Your Honor, is how
05:21:23 18 do we in the context of taking our testimony from various
05:21:28 19 witnesses, certainly with multi-defendants, cross-examine or
05:21:33 20 examine a witness as if they were in trial, as the rules
05:21:37 21 direct such a deposition is to be conducted, with another
05:21:42 22 party's information. Our proposal had been, as long as we
05:21:48 23 had a reasonable basis to examine that witness and it's a
05:21:53 24 document produced by a different party, for example --

05:21:57 25 THE COURT: So company A produces a document

05:21:59 1 designated -- now, is the issue with respect to documents
05:22:03 2 designated confidential and highly confidential or is the
05:22:07 3 main issue with respect to highly confidential documents?

05:22:09 4 Attorney Wadhwani?

05:22:10 5 MS. WADHWANI: I think a particular concern
05:22:12 6 with highly confidential documents, but right now the
05:22:15 7 concern exists for both.

05:22:17 8 THE COURT: Okay. Attorney Buchanan?

05:22:18 9 MR. BUCHANAN: Yes, I mean, that's how it's
05:22:20 10 been framed by the defense. They have requested, if you
05:22:22 11 will, a bar on the use of confidential and highly
05:22:25 12 confidential information with a witness for a codefendant.

05:22:29 13 THE COURT: Right. So in what circumstance do
05:22:33 14 you envision using a document that's been designated either
05:22:37 15 confidential or highly confidential from company A in a fact
05:22:40 16 witness deposition of an employee from company B?

05:22:44 17 MR. BUCHANAN: A meeting, a joint meeting
05:22:47 18 that -- a file purporting to record that meeting exists in
05:22:50 19 one party's file but not in another party's file.

05:22:53 20 THE COURT: Where the witness, for example,
05:22:55 21 was attending that meeting?

05:22:56 22 MR. BUCHANAN: The witness may have been
05:22:57 23 attending or the witness may not have been attending but the
05:23:00 24 company had a representative there where an issue was being
05:23:03 25 discussed pertinent to that defendant. And so we present

05:23:05 1 the witness. And unfortunately, that may not seem like a
05:23:10 2 memo of a meeting that would be designated as confidential
05:23:12 3 or highly confidential.

05:23:13 4 Our experience with the Chicago production, from the
05:23:16 5 manufacturers at least, is medical literature that's public
05:23:20 6 is stamped "confidential" and "highly confidential," news
05:23:23 7 articles are stamped "confidential" and "highly
05:23:26 8 confidential," e-mails forwarding, you know, news articles
05:23:29 9 internally are stamped "confidential" and "highly
05:23:31 10 confidential." We haven't yet seen the productions from the
05:23:34 11 distributors, but fearing that we land ourselves in the same
05:23:37 12 place with distributors, what the defendants have proposed
05:23:41 13 is that before we confront another defendant -- another
05:23:46 14 defendant's employee with a document produced by, say,
05:23:49 15 defendant B, we have to notify defendant B that we intend to
05:23:53 16 do so at least 48 hours before. They have an opportunity to
05:23:58 17 either agree or not agree to our use of that document with
05:24:01 18 the witness.

05:24:02 19 With the liberality with which the defendants seem to
05:24:07 20 be designating documents as confidential and highly
05:24:09 21 confidential, that evolves into us providing an outline for
05:24:13 22 the examination 48 hours before what's supposed to be like a
05:24:17 23 trial examination. With rare exception, the defendants are
05:24:22 24 not in this jurisdiction. We're getting one crack at
05:24:25 25 people, and we're taking them as if they're to be played or

05:24:28 1 used at trial.

05:24:29 2 MR. CHEFFO: Can I just answer?

05:24:31 3 MS. WADHWANI: Please.

05:24:32 4 MR. CHEFFO: I'm sorry, Dave. I didn't mean
05:24:33 5 to interrupt you. Just briefly.

05:24:35 6 I understand, you know, counsel, they're zealous
05:24:38 7 advocates, great lawyers. I've said that many times before;
05:24:40 8 I'll say it again. The idea, though, that kind of what --
05:24:43 9 you know, beauty is in the eye of the beholder, they get to
05:24:47 10 determine what I've seen many, many, many, many times is
05:24:50 11 what a witness becomes is a document delivery device. So
05:24:54 12 have you seen this document? No. Do you think this e-mail
05:24:57 13 from somebody, is that the way a company behaves ethically?
05:25:02 14 Why do you think they would have written that? You know.

05:25:05 15 And then they have some -- they're good lawyers,
05:25:06 16 they're creative. Well, I think it would be helpful to
05:25:09 17 understand X, Y, and Z, and there's some rationale.

05:25:12 18 What we're asking for is not a complete bar. And the
05:25:15 19 idea that we would have advanced notice to be able to go to
05:25:19 20 you and say this is really an unfair way of kind of
05:25:22 21 conducting a deposition if it happens -- and I think,
05:25:25 22 frankly, what happens more often than not is on both sides
05:25:28 23 it becomes an ability for the plaintiffs, not necessarily
05:25:31 24 the folks around this table, but there's probably going to
05:25:34 25 be a lot of other folks around the country who are going to

05:25:36 1 be involved in these, to make a good-faith determination, is
05:25:40 2 this really a document that I have a good-faith basis to
05:25:43 3 show somebody else's witness that's, you know, from one
05:25:46 4 company versus the other. And many times the answer to that
05:25:49 5 will be no, and then it doesn't get shown.

05:25:51 6 And if it is a document, then we at least can have an
05:25:55 7 opportunity to say is this something that is appropriate, is
05:25:57 8 it fair. Because at the end of the day, for the same -- we
05:26:00 9 want people deposed once based on the factual knowledge,
05:26:05 10 based on information, not based on kind of showmanship of
05:26:09 11 here's a bunch of different documents, and I want to use
05:26:12 12 three hours of the deposition to kind of run those through a
05:26:15 13 witness.

05:26:15 14 And I -- unfortunately, that happens with all too much
05:26:20 15 frequency, and I think that's driving our concern, Your
05:26:20 16 Honor.

05:26:23 17 MS. WADHWANI: Well, that's one concern
05:26:24 18 certainly. And the other concern is, Your Honor, the
05:26:27 19 agreed-upon definition in the protective order that we
05:26:30 20 submitted to you of highly confidential information, if we
05:26:32 21 just limit it to that for the moment, is information which
05:26:36 22 if disclosed, disseminated, or used by or to a competitor or
05:26:41 23 other individuals can result in possible antitrust
05:26:43 24 violations or commercial, financial, or business harm.

05:26:46 25 We don't know what Mr. Buchanan means by "reasonable

05:26:51 1 basis." The examples he's given strike me as being
05:26:54 2 documents that would not be determined as highly
05:26:57 3 confidential because it doesn't sound to me like there's
05:27:00 4 going to be a concern about competitive financial business
05:27:03 5 harm if there's a memo about a meeting that took place
05:27:07 6 between the CEO of Teva and the CEO of Mallinckrodt. This
05:27:13 7 is just a hypothetical.

05:27:13 8 THE COURT: Hypothetical, sure.

05:27:15 9 MS. WADHWANI: But there are going to be very
05:27:17 10 real concerns because there are going to be documents
05:27:20 11 produced we expect in this litigation that get to
05:27:23 12 information that goes to companies' sensitive competitive
05:27:28 13 proprietary interest. And so what we are saying here is
05:27:32 14 that it should be something that is worked out on the back
05:27:35 15 end where if they want to show a confidential document to
05:27:40 16 another party, they need to raise that with the Court, that
05:27:46 17 being the presumption. The presumption should be they don't
05:27:48 18 get to do -- show a document that is likely to lead to
05:27:54 19 antitrust concerns or competitive or business harm to
05:27:59 20 another defendant's witness.

05:28:01 21 If -- I can't speak to the City of Chicago. That's --
05:28:06 22 my client was not involved in that case. But if it is the
05:28:09 23 case that there are overdesignations in this case, there are
05:28:13 24 provisions in the confidentiality order for them to mount
05:28:15 25 challenge. There are also provisions that all the

05:28:18 1 defendants have hung onto which is that we will not assign
05:28:21 2 blanket designations of confidentiality and highly
05:28:24 3 confidential designations. So the onus is on us to make
05:28:28 4 sure that in good faith we apply those designations. And we
05:28:33 5 apply those designations in good faith precisely to give us
05:28:35 6 the protections that we need, protections that will
05:28:39 7 effectively be eviscerated if plaintiffs can just go up to
05:28:42 8 any employee of any defendant and show any other defendant's
05:28:47 9 documents.

05:28:47 10 THE COURT: Mr. Buchanan, in the proposed
05:28:50 11 order there is provision under the highly confidential
05:28:55 12 documents that they would not be shown to employees of
05:28:59 13 another company, right?

05:29:00 14 MR. BUCHANAN: Yes.

05:29:02 15 THE COURT: And that indicates unless
05:29:08 16 there's -- for categories of people I could see highly
05:29:11 17 confidential documents if there's an agreement by counsel or
05:29:15 18 separate court order, correct? So it seems to me what the
05:29:18 19 parties have contemplated already was that documents that
05:29:21 20 are designated at least highly confidential would not be
05:29:24 21 shown -- company A, for example, highly confidential
05:29:27 22 documents would not be shown to a witness from company B.
05:29:29 23 That seems to be what the parties had contemplated from the
05:29:32 24 beginning.

05:29:32 25 MR. BUCHANAN: Well --

05:29:33 1 THE COURT: In what was proposed. At least I
05:29:35 2 shouldn't say from the beginning but what was proposed for
05:29:38 3 the Court's consideration.

05:29:39 4 MR. BUCHANAN: So it's paragraph M and
05:29:41 5 paragraph K. I think it's 33M and paragraph 33K. The
05:29:45 6 exception is largely the examination at deposition.

05:29:50 7 If I could pass Your Honor, this is the provision that
05:29:52 8 was in our draft protective order that following our
05:29:58 9 meet-and-confers and discussions with Special Master Cohen
05:30:01 10 was withdrawn in favor of language, paragraph M and K. The
05:30:10 11 brackets are to make it legible.

05:30:14 12 And for the record, it's: During the course of
05:30:16 13 examination at deposition, a party may show confidential or
05:30:19 14 highly confidential information to any witness in this
05:30:21 15 litigation to whom disclosure is reasonably necessary,
05:30:24 16 including witnesses whose statements or conduct are
05:30:26 17 discussed in a designated information and to whom disclosure
05:30:30 18 is not otherwise authorized under this order, provided that
05:30:33 19 no copies of the information designated confidential or
05:30:36 20 highly confidential shall be left with or taken from the
05:30:39 21 deposition by the witness.

05:30:40 22 That's the fundamental kind of point is that the
05:30:44 23 witness doesn't leave with anything from the examination.
05:30:47 24 The witness can be crossed, can be shown, can be examined
05:30:52 25 concerning confidential information. And they don't get the

05:30:55 1 exhibits and they don't take them home with them, but they
05:30:58 2 can nonetheless be questioned about the events and
05:31:00 3 circumstances that are reflected in the documents.

05:31:03 4 We also provide in this -- in our draft provision that
05:31:08 5 counsel for the designating party is provided with a copy of
05:31:12 6 that particular document. And if there's a particular issue
05:31:14 7 that would, frankly, require intervention from the Court or
05:31:21 8 special master or whatever the appropriate reviewing
05:31:25 9 tribunal would be, that the party can seek that at that
05:31:27 10 time.

05:31:27 11 So as a practical matter, we don't want to conduct an
05:31:30 12 examination in a way that's going to yield to these kind of
05:31:36 13 summary requests of the Court on a ruling. So I think the
05:31:42 14 trying to design an order for the hundred-year flood of
05:31:46 15 antitrust violations and other circumstances unfortunately
05:31:50 16 will prevent us from doing this with most documents for
05:31:53 17 which defense counsel would not really have an objection.

05:31:56 18 THE COURT: Well, why shouldn't the default
05:31:58 19 standard be if something's designated confidential/highly
05:32:01 20 confidential from company A, it should not be shown to an
05:32:04 21 employee of company B unless that employee of company B
05:32:06 22 somehow was included in it, received it, altered it, amended
05:32:09 23 it, somehow has factual knowledge of the underlying document
05:32:13 24 itself? I mean, why shouldn't that be the standard?

05:32:16 25 MR. BUCHANAN: Well, if they hadn't seen it,

05:32:17 1 but if they were nonetheless involved in the -- you know, if
05:32:20 2 it was within their scope of business responsibilities or
05:32:22 3 they were engaged in the activity that's referenced in it,
05:32:25 4 if that would be --

05:32:26 5 THE COURT: But then you can ask them
05:32:28 6 questions about it. Rather than showing them the document
05:32:30 7 and putting the highly confidential or confidential document
05:32:32 8 in front of the witness, you can ask them questions.

05:32:34 9 MR. BUCHANAN: Well, then I would certainly
05:32:35 10 want to confront that witness at trial with -- have the
05:32:37 11 opportunity to confront that witness at trial with that
05:32:39 12 document. And I don't know how we can do that with the
05:32:41 13 witnesses we have one crack at.

05:32:44 14 Most of the defendants are outside this Court's
05:32:46 15 jurisdiction. I don't think the defendants are going to
05:32:49 16 consent to bring these employee witnesses, to the extent
05:32:51 17 they have control of them, back to court for trial. So, you
05:32:56 18 know, we'd certainly want to make a record, a video record
05:32:59 19 that could be used before a jury with this witness
05:33:02 20 testimony. And if -- I don't think I would be prevented
05:33:05 21 from using that document in open court in a trial
05:33:08 22 proceeding.

05:33:10 23 MR. CHEFFO: To that point, that is one of the
05:33:13 24 reasons why -- and forgive me if I'm off on the different
05:33:18 25 variations, but I think one of the proposals was to get it

05:33:20 1 in advance just for that purpose. Because I would agree
05:33:23 2 with you in the sense that we don't want a ruling that after
05:33:26 3 the deposition, oh, yeah, that was a document that, you
05:33:29 4 know, you could have used or should have used. I mean, if
05:33:31 5 there's a provision where it's provided to us, we can raise
05:33:34 6 our objections if we have any, they can get resolved quickly
05:33:37 7 by the magistrate judge or the special master. And then
05:33:42 8 obviously if we're overruled, then you have an opportunity
05:33:44 9 to use it. If not, then we've saved ourselves a lot of
05:33:47 10 headache at deposition.

05:33:48 11 MR. BUCHANAN: I'd submit, Your Honor, that we
05:33:50 12 could very well start with this framework here where the
05:33:54 13 witness doesn't get shown something at a deposition until
05:33:57 14 it's been provided to the designating party. If the
05:33:59 15 designating party thinks that implicates antitrust
05:34:03 16 considerations or some other extremely sensitive
05:34:05 17 considerations, then we could raise that issue with the
05:34:07 18 Court. And if it becomes something that is common in this
05:34:11 19 litigation that requires an alternative, then we can
05:34:14 20 certainly look at an alternative.

05:34:16 21 I don't think it's going to be something where the
05:34:17 22 parties are going to really feel that it implicates
05:34:20 23 antitrust considerations or, you know, the trade secret for
05:34:26 24 Coke that should prevent a witness from being examined in an
05:34:30 25 examination that's supposed to be like trial where they

05:34:31 1 don't even get to take it home it with them, from actually
05:34:34 2 occurring in that setting.

05:34:34 3 MS. WADHWANI: It sounds like we're just
05:34:36 4 having a -- to your point, an agreement about what the
05:34:39 5 default -- disagreement about what the default standard is.
05:34:42 6 We're suggesting the default standard should be that you
05:34:44 7 can't show it to them, but if you want to, show us the
05:34:49 8 document in advance and we will take that under
05:34:51 9 consideration and do it in enough advance so that we don't
05:34:56 10 interrupt the deposition process.

05:34:57 11 What I see in this language is three points. One, to
05:35:04 12 Mr. Buchanan's statement that the witness would not get to
05:35:07 13 take home the document, the information is in the witness's
05:35:10 14 head. He or she has heard it. And you can't unring that
05:35:13 15 bell, regardless of whether or not the witness gets to take
05:35:16 16 home the document.

05:35:18 17 The second point is that if we're doing this
05:35:23 18 throughout a deposition, that's going to slow the deposition
05:35:25 19 process. We have an aggressive schedule here with multiple
05:35:30 20 defendants and multiple plaintiffs, all of whom will be
05:35:34 21 subject to multiple depositions during the next few months.
05:35:40 22 To constantly be -- even if it only happens two or three
05:35:44 23 times in each deposition, we're going to be double tracking,
05:35:47 24 triple tracking depositions.

05:35:49 25 I understand that Special Master Cohen has represented

05:35:52 1 that you will be available, but even if you are very
05:35:55 2 gracious with your time, Judge Ruiz, I don't think you will
05:35:58 3 have the time to sit on the phone all day resolving these
05:36:02 4 disputes because the presumption is that they can show them.
05:36:05 5 These disputes can be better handled if the presumption is
05:36:08 6 they cannot show these documents unless the parties can
05:36:10 7 agree or unless they get a court order in advance.

05:36:13 8 MR. BUCHANAN: Your Honor, the ultimate
05:36:14 9 concern is that by designating information confidential and
05:36:17 10 highly confidential -- and the defendants didn't have to
05:36:22 11 come to court and make the showing to get that designation
05:36:25 12 on their documents; they're self-designating. We agree that
05:36:29 13 they can self-designate. There are rules around it, but
05:36:32 14 when I do see medical articles designated as highly
05:36:35 15 confidential, news articles designated highly confidential,
05:36:37 16 or, you know, submissions to an advisory committee, a
05:36:42 17 briefing document, available for public release, stamped
05:36:45 18 "confidential," then what I think is going to happen is that
05:36:48 19 for me to examine a witness, I have to give my deposition
05:36:51 20 outline to the defense 48 hours before.

05:36:53 21 So what was supposed to be essentially a protective
05:36:59 22 order and a discretionary authority by the defense to call
05:37:01 23 the balls and strikes on a protective order to protect their
05:37:03 24 documents now becomes a vehicle through which they can get
05:37:07 25 our deposition notes.

05:37:09 1 And I don't think we lose a lot by seeing if what we
05:37:14 2 believe will not be problematic truly is the case. If Your
05:37:17 3 Honor is getting needlessly troubled by plaintiffs' counsel
05:37:22 4 or defense counsel in connection with these calls, then,
05:37:26 5 okay, maybe we need to figure out an alternative. But the
05:37:28 6 alternative to giving being we have to give essentially a
05:37:33 7 trial examination to the defense for 48 hours to work with a
05:37:36 8 witness before, that's quite concerning to the plaintiffs.

05:37:38 9 MR. CHEFFO: Here's what I really just
05:37:40 10 fundamentally disagree. I mean, the idea of if their trial
05:37:42 11 outline is going to be they're going to spend most of their
05:37:45 12 time deposing company A's witness by company's B, then that
05:37:50 13 probably is a trial outline that's problematic, right?

05:37:53 14 So again, we're taking this specific issue which you
05:37:57 15 would think, right, most exceptions would be you want to
05:38:00 16 talk to the fact witness about things he or she knew, did,
05:38:04 17 heard, participated, not what, you know, Purdue wants to
05:38:09 18 talk about Cardinal's documents. That, you would think, in
05:38:13 19 this litigation is going to be an exception.

05:38:15 20 So the idea that this is going to be this incredible
05:38:20 21 burden to see their outline I think is widely overstated. I
05:38:22 22 think it's going to be a narrow collection of documents, if
05:38:25 23 any, and this is a very workable solution.

05:38:27 24 I will tell you, I know it's a local rule, but I was
05:38:30 25 just involved in the Lipitor litigation before Judge Gergel,

05:38:34 1 and the rule there was that the parties actually
05:38:38 2 exchanged -- they had to give exhibits 48 hours before, both
05:38:41 3 sides did. And it actually was incredibly efficient because
05:38:45 4 to the extent that there were any concerns about documents.
05:38:48 5 So again, that's not the local rule here. I'm not proposing
05:38:51 6 it. But it was something that I was apprehensive about as
05:38:54 7 kind of a litigator before, but those kinds of exchanges
05:38:58 8 actually really moves things along.

05:38:59 9 MS. WADHWANI: And to add to Mr. Cheffo's
05:39:02 10 point, it's not going to be the case that any counsel in
05:39:06 11 this litigation is going to see a document for the first
05:39:10 12 time 48 hours before because they are putting together
05:39:12 13 outlines. They've already selected documents, which means
05:39:15 14 they've seen them before and maybe noted the fact it was a
05:39:19 15 document of interest. If the plaintiffs think they are
05:39:22 16 seeing overdesignated documents, when they start reviewing
05:39:25 17 them and conducting searches to identify those documents of
05:39:29 18 interest, they can come to us or they can come to the Court
05:39:33 19 if our meet-and-confers are not fruitful and say, Judge, I
05:39:37 20 think we have a problem here, they're overdesignating and we
05:39:39 21 can't even put together our deposition outlines because we
05:39:42 22 think they've overdesignated and we need assistance on this.

05:39:45 23 THE COURT: Attorney Buchanan, go ahead.

05:39:46 24 MR. BUCHANAN: Just one final observation.

05:39:48 25 We -- the presumption by Mr. Cheffo that there really is not

05:39:52 1 going to be a good-faith basis to use one of the defendant's
05:39:55 2 documents against another really is contrary to one of our
05:39:57 3 central allegations in our RICO claims here. There will be
05:40:00 4 showing of documents from one defendant to other defendants
05:40:04 5 I think by necessity. Depending on the type of employee,
05:40:08 6 depending on the meetings they were engaged in, depending on
05:40:11 7 the front groups that they simultaneous engaged or that
05:40:13 8 they're referenced in, et cetera, I would anticipate that
05:40:16 9 one defendant's documents will be relevant to another
05:40:19 10 defendant's employees throughout the discovery process.

05:40:23 11 I'd submit that the likelihood that those documents
05:40:27 12 are going to trigger antitrust concerns, revealing the trade
05:40:32 13 secret for Coke, the types of concerns that would be the
05:40:35 14 basis of a 48-hour disclosure rule I think are not the
05:40:39 15 circumstances, the types of documents that we're talking
05:40:42 16 about here. And I'd submit that maybe we could kick this
05:40:44 17 can down the road a little bit until we're in a place where
05:40:50 18 the solution of counsel intervening with a document that
05:40:53 19 raises those concerns becomes unworkable.

05:40:58 20 THE COURT: Now, the default standard in the
05:41:01 21 Chicago litigation -- I presume counsel are familiar with
05:41:08 22 the default standard that was used in the Chicago
05:41:09 23 litigation. The default standard was that confidential and
05:41:11 24 highly confidential documents from company A were not shown
05:41:13 25 to company B employees unless there was agreement or a

05:41:19 1 separate court order.

05:41:20 2 MR. BUCHANAN: I can neither agree nor
05:41:21 3 disagree, but if you read that there, Your Honor, I did not
05:41:24 4 go and look at that order for that provision.

05:41:27 5 MR. ACKERMAN: There was not a RICO claim in
05:41:28 6 the Chicago litigation.

05:41:29 7 THE COURT: I understand that as well.

05:41:30 8 And, Mr. Buchanan, you had just I guess invited the
05:41:33 9 Court, I'll use your words, to kick the issue down -- kick
05:41:36 10 the can down the road a little bit. Explain that to me.

05:41:39 11 How were you thinking that this issue could be tabled
05:41:42 12 for further consideration?

05:41:43 13 MR. BUCHANAN: I think the likelihood that we
05:41:45 14 will use documents that will trigger a concern by the
05:41:48 15 designating party at a deposition to intervene with the
05:41:52 16 Court to say this is the trade secret for Coke or it
05:41:56 17 triggers antitrust concerns, this nonparty witness, I think
05:41:59 18 those are extremely rare. I think the nature of the
05:42:01 19 documents that we would want to do them with will probably
05:42:04 20 be documents that were more in terms of summarizing meeting
05:42:07 21 occurrences, summarizing interactions with third parties,
05:42:11 22 documents that are just of a different ilk but that have
05:42:15 23 nonetheless been designated as confidential or highly
05:42:18 24 confidential.

05:42:19 25 MS. WADHWANI: I just see us back here in

05:42:21 1 front of you then a month from now or whenever it is that we
05:42:25 2 have kicked the can down the road and how far it goes. I
05:42:29 3 think this issue needs to be determined now, Your Honor.

05:42:34 4 MR. BOEHM: Your Honor, may I just say one
05:42:36 5 last thing?

05:42:36 6 THE COURT: You may. Go for it.

05:42:39 7 MR. BOEHM: Mr. Boehm from Williams &
05:42:43 8 Connolly.

05:42:43 9 I think respectfully, Your Honor, you may have had the
05:42:45 10 answer on this issue when you first asked Mr. Buchanan for
05:42:48 11 an example, and the example of an instance where he thought
05:42:51 12 he might need to do this was the case of a joint meeting
05:42:55 13 between the parties. Now, one could question the likelihood
05:42:58 14 of that type of document being marked "highly confidential,"
05:43:01 15 but I would also raise how likely that is, how common that
05:43:06 16 likely would be.

05:43:07 17 To the extent that type of document exists and one is
05:43:09 18 calling into question the good-faith basis of the highly
05:43:13 19 confidential designation for that document, that answers the
05:43:15 20 question of where the presumption should be. That may be an
05:43:17 21 issue where we need to look at that. We can come to an
05:43:20 22 agreement. If there's not one, we can bring it to the
05:43:22 23 Court.

05:43:22 24 But to flip the entire presumption such that any
05:43:26 25 document marked "highly confidential" is presumptively going

05:43:29 1 to be allowed to be used is truly extraordinary. And that's
05:43:33 2 why I think Mr. Buchanan started with that example.

05:43:35 3 I think there was some little bit of shift of emphasis
05:43:38 4 toward the end where it sounded like maybe it might make up
05:43:41 5 more of the examination outline than he originally
05:43:44 6 indicated. But I think that answers the question of where
05:43:47 7 the presumption ought to be here.

05:43:48 8 THE COURT: Okay. So I'm clear then,
05:43:51 9 defendants' position -- is your position still that
05:43:54 10 documents labeled "confidential," separating highly
05:43:59 11 confidential, but documents that are labeled "confidential"
05:44:01 12 from company A should not be shown to an employee from
05:44:04 13 company B unless there's some advance notice? Is that still
05:44:12 14 the current position that defendants are having here?

05:44:15 15 MS. WADHWANI: That is correct.

05:44:15 16 THE COURT: In addition to highly
05:44:17 17 confidential?

05:44:17 18 MR. CHEFFO: That's correct.

05:44:18 19 MS. WADHWANI: Yes.

05:44:18 20 THE COURT: Mr. Buchanan, you had something
05:44:19 21 you wanted to add?

05:44:19 22 MR. BUCHANAN: Yes, Your Honor. The proposal
05:44:20 23 for the plaintiffs is the one that's reflected in the one
05:44:21 24 page that I provided to the Court.

05:44:22 25 THE COURT: And that's the one you read on the

05:44:24 1 record?

05:44:24 2 MR. BUCHANAN: A portion of, yes, Your Honor.

05:44:26 3 There is one I guess nuance that I'd add to the defense
05:44:29 4 proposal.

05:44:29 5 THE COURT: Plaintiffs' proposal or the
05:44:31 6 defense proposal?

05:44:32 7 MR. BUCHANAN: To the defense proposal of the
05:44:33 8 48 hours' notice.

05:44:34 9 If that were the case, we are sufficiently concerned
05:44:37 10 about having to reveal our outlines that the mechanism for
05:44:44 11 correcting confidential and highly confidential designations
05:44:46 12 I think would have to be significantly altered.

05:44:50 13 Counsel alluded to a mechanism in the order through
05:44:54 14 which we can say these documents are inappropriately
05:44:58 15 designated as confidential or highly confidential. And then
05:45:01 16 the way it's currently written, the plaintiffs bear the
05:45:05 17 burden of making the motion. If the defendants want to
05:45:09 18 maintain that, they bear the burden of persuasion on the
05:45:12 19 motion as they would under 26C for a protective order.

05:45:16 20 My concern, Your Honor, would be that if this were
05:45:20 21 going to be the default, the plaintiffs would necessarily be
05:45:23 22 challenging in large numbers confidential and highly
05:45:27 23 confidential designations to strip them. I would want the
05:45:31 24 defendants to have to make that motion to the Court and
05:45:34 25 defend those designations rather than us move and then they

05:45:40 1 bear the burden on it. We do not want to be in a position
05:45:43 2 of revealing our outline, so we will have to create a
05:45:46 3 separate track essentially to have them prove up their
05:45:49 4 confidential and highly confidential designations.

05:45:52 5 MS. WADHWANI: I was about to say, Your Honor,
05:45:54 6 I think CMO 1 in Section 9-0 sets forth the process for
05:46:00 7 raising discovery disputes with you, and we understand that
05:46:04 8 to be the process we're all bound by, which is the parties
05:46:07 9 meet and confer. If they cannot reach agreement through
05:46:10 10 that process, then they reach out to the clerk to seek a
05:46:14 11 meeting with either you and/or Judge Polster. And at that
05:46:18 12 time, if you and Judge Polster upon hearing the issues think
05:46:21 13 that either a letter or a motion needs to flow, you will
05:46:26 14 make your ruling at that time.

05:46:29 15 MR. CHEFFO: I would just say, I mean, again,
05:46:31 16 I think they are now essentially creating a straw man: If
05:46:34 17 you rule this way, you have to change everything about the
05:46:37 18 CMO.

05:46:37 19 I think there's good reasons why that CMO said what it
05:46:40 20 does, because, again, from experience -- and this is not
05:46:42 21 nefarious -- but what you will get is we have this laundry
05:46:46 22 list, there's 10,000, a million documents that we think we
05:46:48 23 challenge, because all they had to do was put that on a word
05:46:51 24 processor, put the burden on us, whether they really need
05:46:54 25 those documents or not. And then we're kind of back to

05:46:56 1 square one. So I think those are apples and oranges.

05:46:58 2 I think what we've been talking about is kind of a
05:47:00 3 workable approach. I mean, I think in a perfect world we'd
05:47:03 4 say no documents unless there's a showing, but I think we're
05:47:06 5 trying to offer what's we think, you know, a reasonable
05:47:09 6 workable solution here.

05:47:10 7 And like anything in this case, if it turns out that
05:47:14 8 it -- the system is breaking down or there's some problems,
05:47:17 9 I mean, you're one phone call and one trip on an airplane
05:47:20 10 away. But this seems to be a very workable, sensible -- you
05:47:24 11 know, because these provisions are going to apply to both
05:47:26 12 sides.

05:47:29 13 THE COURT: So, Mr. Buchanan, the defendants'
05:47:32 14 request to have 48-hour notice, I presume, based upon what
05:47:37 15 you and plaintiffs' counsel have indicated, you do not agree
05:47:40 16 to that?

05:47:41 17 MR. BUCHANAN: We do not.

05:47:42 18 THE COURT: Okay. Based upon the fact that
05:47:45 19 the parties have not been able to reach an agreement with
05:47:49 20 respect to how to handle documents used in deposition that
05:47:55 21 are designated confidential and highly confidential, then
05:47:57 22 the default standard will be documents designated
05:48:00 23 confidential and highly confidential will not be -- cannot
05:48:06 24 be used in deposition of another company's employees unless
05:48:10 25 that company employee has in any way authored it, received

05:48:18 1 it, edited it, commented on it, had some underlying factual
05:48:23 2 basis to testify about that document.

05:48:26 3 To the extent that a document's designated as
05:48:29 4 confidential or highly confidential and plaintiffs' counsel
05:48:34 5 or in fact defendants' counsel, if that will be the case,
05:48:37 6 would like to use such a document in deposition, then by all
05:48:39 7 means they can try to reach agreement with respect to that.

05:48:41 8 If there's an issue that counsel believes documents
05:48:44 9 have been overdesignated, then they can raise that issue
05:48:46 10 with the Court.

05:48:48 11 To the extent that the Court makes a determination
05:48:50 12 documents have been overly designated as confidential or
05:48:53 13 highly confidential, then either I or Judge Polster will
05:48:58 14 reconsider the approach that parties use with respect to
05:49:01 15 highly confidential and confidential document use in
05:49:03 16 deposition. But the standard will be that to the extent
05:49:07 17 documents are labeled "confidential" or "highly
05:49:10 18 confidential," they're not to be used in deposition with a
05:49:13 19 witness from another company unless of course that -- as I
05:49:21 20 indicated, that witness has either received it, drafted it,
05:49:25 21 commented on it, in some way have an underlying factual
05:49:29 22 basis to testify about that document.

05:49:32 23 And I will trust that counsel will have an opportunity
05:49:36 24 to meet and confer with respect to the appropriate text to
05:49:41 25 propose to the Court based upon that framework to govern the

05:49:45 1 use of such documents in depositions going forward.

05:49:49 2 Mr. Buchanan, anything further for the Court to
05:49:52 3 consider?

05:49:53 4 MR. BUCHANAN: No, Your Honor.

05:49:55 5 MR. KENNEDY: Your Honor, Eric Kennedy.

05:49:57 6 THE COURT: Yes, Mr. Kennedy.

05:49:59 7 MR. KENNEDY: If something is marked as
05:50:01 8 confidential and that document is available in the public
05:50:03 9 realm, let's say a medical article, a newspaper article, is
05:50:07 10 that to be treated as confidential and not utilized in the
05:50:11 11 context of what we've been discussing?

05:50:14 12 THE COURT: I think that will be an
05:50:15 13 opportunity for counsel to meet and confer with respect to
05:50:19 14 the designation of a document as confidential and whether or
05:50:21 15 not it should be designated as confidential or in fact it's
05:50:24 16 really available in the public realm.

05:50:27 17 MR. KENNEDY: But again, that's showing
05:50:28 18 defense counsel what we're going to utilize in a deposition.
05:50:31 19 So we could approach that en masse, then, prior to the
05:50:34 20 beginning of depositions?

05:50:35 21 THE COURT: I'm not going to micromanage how
05:50:38 22 counsel at this point address those issues. I'll leave it
05:50:41 23 up to counsel based upon your experience to address the
05:50:45 24 issues as they come forward.

05:50:47 25 But I will indicate to the extent that things are

05:50:50 1 available in the public realm and are designated
05:50:52 2 confidential or highly confidential, then that raises a
05:50:55 3 serious question in this Court's mind as to proper
05:50:59 4 designation of a document to begin with. Then the Court
05:51:01 5 would entertain revised protocol going forward in context.

05:51:06 6 MR. BUCHANAN: Thank you, Your Honor.

05:51:06 7 MR. KENNEDY: Thank you.

05:51:06 8 THE COURT: Anything else, Attorney Wadhwani?

05:51:08 9 MS. WADHWANI: No, thank you.

05:51:09 10 THE COURT: Counsel for the defendants?

05:51:10 11 MR. CHEFFO: No.

05:51:11 12 THE COURT: Counsel for plaintiffs?

05:51:12 13 Yes, Mr. Weinberger.

05:51:14 14 MR. WEINBERGER: We're interested in, aside
05:51:16 15 from these issues, what the Court's intent is in terms of
05:51:24 16 holding further conferences or hearings. Are you going to
05:51:28 17 put something -- do you want something on the calendar once
05:51:31 18 a week? More or less frequently? Do you want to wait until
05:51:36 19 we have issues that we need to present to you? Do you have
05:51:40 20 some thoughts as to how you want to manage this,
05:51:43 21 particularly in light of the fact that, you know, we are in
05:51:45 22 such a tight time frame?

05:51:47 23 THE COURT: What I would ask, then, is for
05:51:50 24 counsel, when you're meeting with respect to the orders that
05:51:52 25 you're going to file with the protective order as well as

05:51:56 1 the ESI document production protocol, that you meet and
05:52:01 2 confer to decide how you would like the Court's assistance
05:52:05 3 going forward. And if you think that regular periodic
05:52:09 4 meetings with respect to underlying discovery issues is
05:52:11 5 something you think would be beneficial to assist the
05:52:14 6 counsel and the parties in moving the matter forward, then
05:52:16 7 by all means bring that proposal to the Court's attention
05:52:19 8 and we'll address that issue, whether it's me getting
05:52:22 9 involved or Judge Polster getting involved.

05:52:24 10 But to the extent counsel would like additional
05:52:26 11 judicial involvement, then that's something that we will
05:52:29 12 definitely take under advisement and, to the extent
05:52:32 13 appropriate, be hands-on.

05:52:34 14 MR. WEINBERGER: Good. Thank you.

05:52:35 15 THE COURT: Thank you, sir.

05:52:36 16 MR. KENNEDY: One -- I apologize. And again,
05:52:38 17 I think we're more looking for guidance.

05:52:40 18 With respect to the new party defendants named in the
05:52:44 19 amended complaint, from our discussions in court this
05:52:47 20 morning, the Court indicated that with respect to the
05:52:50 21 service being complete defined by complaint, that may not
05:52:53 22 happen until May 23 potentially. Which means that we cannot
05:52:58 23 serve discovery on them until May 24, May 25. They don't
05:53:04 24 become subject to CMO number 1 with respect to the
05:53:07 25 production of documents that they have previously produced.

05:53:12 1 I guess we're looking for guidance what we do.

05:53:14 2 In the perfect world we could have six months to do
05:53:17 3 discovery. In something less than the perfect world we
05:53:20 4 would contact those new party defendants and say you will be
05:53:23 5 served in several weeks, but we want to serve our discovery
05:53:26 6 now, or we address either case management order number 1 and
05:53:32 7 so you best begin looking at documents from prior
05:53:34 8 productions.

05:53:37 9 What is your thought on that predicament? Because
05:53:40 10 it's two weeks from now, I guess.

05:53:41 11 THE COURT: Sure. With respect to issues like
05:53:43 12 that and issues that may come up as the litigation unfolds,
05:53:47 13 the practice that we've followed thus far for counsel to
05:53:50 14 work with the special masters to determine the appropriate
05:53:53 15 way to address that I think is the approach that should be
05:53:55 16 followed. To the extent there's a need to involve either
05:53:58 17 Judge Polster or myself in those discussions, then we can
05:54:01 18 make ourselves available. But I think the initial procedure
05:54:04 19 should be to address those issues with the special masters.

05:54:06 20 MR. KENNEDY: Thank you.

05:54:07 21 THE COURT: Thank you, Counsel.

05:54:13 22 (Proceedings adjourned at 5:54 p.m.)

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23 **C E R T I F I C A T E**

24 I certify that the foregoing is a correct transcript
25 of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

/s/ Lance A. Boardman 05/11/2018
Lance A. Boardman, RDR, CRR DATE